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FROM

Charles William Eliot.

BY RIGHT OF SWEET:

A Defense of Capital-Punishment,
Based on a Searching Examination of
History, Theology, and Philosophy

by

Leigh H. Irvine

Though not so pleasant, punishment is as necessary as reward. It is as important to hang some men as to honor others.—E. W. Howe.

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SYNOPSIS

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The Book and Its Purpose

THIS Volume is a frank and uncompromising defense of capital-punishment for the deliberate and inexcusable murderer, duly convicted after a clear and unmistakable case against him. It challenges every contention of those who would substitute the so-called law of love (in his case) for the law of force.

The author, formerly a lawyer and a writer on law subjects, but for many years engaged in journalism and authorship, has had a wide experience with criminals, courts, and prisons. Furthermore, he has debated the question of capital-punishment on many public platforms and in the columns of newspapers and magazines during a period of twenty years. Let this answer the pardonable question as to his qualifications to speak on so important a subject. He deems the time ripe for a thorough analysis of the fundamentals underlying the entire problem of punishment **as applicable to the murderer**. It is the solemn duty of every voter to analyze this question in order that he may express his opinion intelligently, especially in states where the initiative and referendum prevail.

Consider the case of the cold-blooded murderer—the secret poisoner, the hired assassin, the wretch who deliberately destroys human life for cruelty, for revenge, or for gain. What valid plea can be made for such a scoundrel's life? Why should he cumber the earth and pollute it with his wickedness? Why should honest men feed and clothe him, or make the hopeless at-

tempt to mold him anew? What man whose wife or daughter died at his hands would abolish the hemp in his case? And why should the state forego the ancient sacrifice, since all history justifies it?

Every argument from the deep antiquity of human experience, every ethical canon, every commandment of religion, and every motive for the protection of society demands the elimination of the deliberate murderer by the gates of death. The penalty that ends his life is still the sovereign remedy for the wild beast of a man who follows in the footsteps of the Cains of history. Society is safest, and is safe only when such degenerates are speedily returned to the dust whence they sprang.

For the armed assassin, the garroter, the wielder of the midnight bludgeon, the coward who sheds the blood of his innocent and defenseless victim, there can be no defense. The gallows, as Sir Leslie Stephen concludes in his masterful work on ethics, is the only argument against the assassin who uses either knife or club in the darkness, who stabs and robs his sleeping victim, or violates and strangles young women in secret places. As well try to reform hell itself as the character of the inhuman monster who brutally slays his fellow man. That depraved murderers are beyond reform is proved by the history of every penitentiary where the experiment has ever been tried.

A Lucchesi, released from prison as reformed, after finishing his second term for murder in Italy, promptly selects and slays as his third victim the most brilliant editor of Leghorn, who had helped to convict him, and whom he had sworn to murder; the prime minister of Greece (Delyanni) is brutally slain by Gherakaris, who had just been set free as reformed, after serving

a short term for butchering his wife; an Italian assassin travels to a Swiss canton in which the death penalty has been abolished, in order to kill the Empress of Austria; a Spido travels from drastic France to lenient Belgium to start his assassination plans against King Edward VII, then prince of Wales; and the county attorneys of Minnesota (1912), weary of that State's farcical life imprisonment law for murder, petition the Legislature to restore capital-punishment. Such is the history of reform, such the harvest of a mistaken policy of lenity in the presence of the slayers of men!

No wonder that the learned and gentle Andrew D. White, when president of Cornell, said that society was obliged to fall back on the law of self-preservation, and "cut through for its life, since life imprisonment is impossible, **because there is no life imprisonment,**" the average life term being less than seventeen years, even if not cut shorter by pardons or paroles.

To return fiendish murderers to their freedom, **under any pretext or for any purpose**, is a grave injury to the innocent members of society, who are endangered by their presence, both by reason of the frequency of relapse and by the ease with which, disregarding all moral and legal ties, they multiply and replenish their kind; to permit them to associate with other prisoners, is to corrupt the entire penitentiary and **jeopard*** the lives of other convicts, as well as the lives of the prison guards; to place them in solitary cells is to kill them by insanity and slow torture, a method unspeakably cruel in comparison with **elimination by one merciful stroke**, which penalty was

*The verb is preferred to **jeopardise**, which has been challenged by the masters of our speech.

indorsed (for extreme cases) by Lombroso himself, the prime authority upon whom the abolitionists lean for support.

To prove the validity of the contentions herein set forth, is the purpose of the pages that follow. Bibles and creeds, prelates and philosophers, the wisest and best of mankind have adopted capital-punishment as the only logical remedy for the awful crime of deliberate and inexcusable murder—the killing of a human being for base revenge, out of malice, or for any other of the wicked motives that are costing an increasing number of innocent lives. The author has re-examined the foundations of learning, quoted from the masters, and tried to meet every issue face to face.

At no time in the history of the United States has there been a graver duty of citizenship than that which confronts jurors in criminal cases to-day. Under the wire-drawn theories of the super-academic, an increasing number of faddists would treat murderers by scholastic theories of psychology, a method barren of any result save disastrous lenity. A fast and loose moral code, void of punishment, is also void of influence.

Some of the efforts to save the lives of cold-blooded murderers are based on the argument that we no longer have men of heroic mold, loyal and courageous in support of the law of the land, when it comes to administering the death penalty, which still obtains in most of the states of the Union. It is said with much truth that it is next to impossible to obtain juries that will abide by their solemn oaths and enforce the drastic law against murder. It thus falls that fiendish criminals are often permitted to escape adequate punishment, and that juries constantly bring in ridiculous verdicts of insanity or justification—anything, even an

obviously dishonest failure to agree—to escape shedding the blood of the prisoner, though he be as guilty as Nero and Caligula.

What is the cause of this dereliction of duty, this almost maudlin regard for the lives of degenerates? Why are American juries so much more delinquent than those of Great Britain, whose men are less given to crimes of violence than are our own countrymen? Is it that our people have been frightened by the hue-and-cry of the sentimentalists, who incessantly brand capital-punishment as legal murder? Is it because of a fear that an innocent man may die at their hands, even as innocent men have died on battlefields in order that foreign invaders be repelled? Shall the lovers of law and order fold their arms and permit the sentimental crusaders to go unanswered?

Shall all murderers go free, or be sent to luxurious prison-hospitals because of a possible judicial blunder, even though perpetrated without malice, and for the protection of society? As well banish surgery because one mistake of the knife, one error in diagnosis now and then sacrifices a patient; or as well abandon armies and warships, forts and defenses when an invading foe appears, lest innocent men lose their lives in order that freedom may be preserved.

The time is ripe for courage and common-sense. Let the X-Ray of reason be applied to the case. Juries may then do their duty, and thousands of innocent lives will be spared, every year, from death at the hands of murderers. If capital-punishment is right, it should be enforced when required. The author of this volume believes that the following pages contain unanswerable proof of the wisdom of the death penalty.

In *The New World*, by the Reverend Josiah Strong, an eminent jurist is quoted as saying: "The taking of life as a penalty for high crime, by due process of law, and under the most careful safeguards, seems to be the only way of taking life to which the average American has any objections."

In *American Problems*, page 77, Professor Hugo Munsterberg says that disregard of law is the most dangerous psychological factor in American civilization—that crimes against life are twenty times more frequent than in Europe; that in a popular melodrama the sheriff says solemnly: "I stand here for law"; and when another shouts in reply, "I stand for common sense," night after night the public breaks out into jubilant applause. Munsterberg adds: "To foster this immoral negligence of law by fabricating hasty, ill-considered laws in a hysterical mood, laws which almost tempt toward a training in a violation of them, is surely a dangerous experiment in social psychology." He was not discussing capital-punishment, but his words apply to the present sentimental and hastily considered movement against it as much as to any other ill-advised agitation in the United States.

LEIGH H. IRVINE.

San Francisco, February, 1915.

Arguments Condensed from This Volume

“WHOSO sheddeth man’s blood, by man shall his blood be shed,” was not repealed by Christ. The “Thou shalt not kill” is interpreted by all commentators with reference to certain logical and sane exceptions, viz: **except in personal self-defense, or in a just war of defense, or, by sanction of the state;** for “He (the ruler) beareth not the sword in vain.” The sword is the symbol of power, of just authority. Render unto Caesar the things which are his.

We do not slay man-eating lions and tigers in the street because we are cruel, but because either they or we must give up the city. We do not slay cunning assassins who ravish women and disembowel pedestrians because we are bloodthirsty, but because society is not safe when they are at large. We slay them that others may be warned and deterred from crime.

Elimination of the wild beast of a man by one merciful stroke was justified by Lombroso himself, the one authority on whom the abolitionists lean.

Non-resistance and the sublimated doctrine of love would leave the community practicing it the prey of any band of murderers that cared to visit it. **Not to resist** in such a case is a crime, and non-resistance becomes folly. As well try to succeed among cannibals by following a code fit only for angels.

A DEFENSE OF CAPITAL-PUNISHMENT 11

The swift and certain execution of the ancient law, punishment by a means bearing a just proportion to the enormity of the crime, is the best deterrent known. Death is still the king of terrors and the only terror that holds some men in check.

Under the modern system of pardons and paroles, turkey dinners and cadet uniforms, there is in reality no such thing as life-imprisonment. The fiends are often released, only to commit more murders.

There is too much loose talk about the sacredness of human life. A life is sacred only when it makes itself sacred, when it respects the lives and rights of others. There is nothing sacred about the fiend who wields the midnight bludgeon or who garrotes young women in secret places.

Capital-punishment should be abolished, but not until the murderers of the world abolish it first.

The early Christians were forced to abandon the doctrine of love and non-resistance. Their attempt to follow the mild interpretation is one of the great failures of history.

Romilly and the other great prison reformers of his time were careful to preserve the gallows for treason and murder.

Before the state took over the punishment of murderers it was lawful for the individual to slay the murderer of his kin. The Scandinavian pre-Christian law allowed murderers to expiate for their offenses by paying a monetary price, determined in advance of the crime.

All human experience shows that life-imprisonment, so-called, does not become life-imprisonment in fact. After persons and situations have changed, or under the sway either of weak, corrupt, or mistaken govern-

ors and boards many murderers have been set free, only to become murderers again.

The taking of an innocent man's life by judicial process, after exercising every care, and hedging the victim with countless safeguards and technicalities, is very rare; but the taking of an innocent human life in this way, terrible as it is, should not lead us to turn murderers loose to destroy still other innocent lives, or to relax the terror of the law as a warning to evil-doers. The taking of an innocent human life in a just war of self-defense is regrettable, but necessary. The loss of an innocent human life by the slip of a surgeon's knife is regrettable, but we do not therefore abolish surgery. But the deliberate taking of an innocent human life by society might be ethically justified if such a sacrifice, for example, would save a multitude of other human lives. This conclusion has been unanswerably worked out by ethical classes in a score of great universities.

There is altogether too much teaching and preaching that governments are mainly responsible for every man's faults. As soon as a young man begins to imagine that he is a helpless victim of the ages, a creature ensnared by environment and doomed to defeat, his case is next to hopeless. Why this cult that society alone makes one man a thief, his brother an honest gentleman? The New York **World** recently (1914) stated the case forcibly when it said that, despite low wages and other injustices, no self-respecting young woman can expect to be excused for lack of chastity on the plea that while a virtuous career is possible at \$9 a week, a drop of \$1 on her weekly wage justifies her lapses.

Ex-President Charles W. Eliot of Harvard is re-

ported in the New York Times of October 27, 1913, as saying: "One reads frequently that the cause of immorality and prostitution is the failure of employers to pay 'a living wage.' Must the church stand for this doctrine? It seems to me a demoralizing and degrading doctrine in all its implications. Poverty is a far safer condition than immoderate wealth."

Too many men and women indulge themselves in gushing sentimentalism over criminals. They over-emphasize the fact that "life, education and environment" are the forces that "victimize and penalize every criminal." This is a half-truth in some instances, but no truth at all in most of the cases where it is invoked as a reason for lenity toward offenders. If society is wholly responsible, why not apologize to the cut-throat and pension him for life? If you don't hang him, why imprison him? He surely needs neither gallows nor cell if the blame is all on the universe at large.

Young men and women should bear in mind that many of the crooks of the world—burglars, forgers and murderers—were born of poor but honest parents. These parents often bore other sons and daughters whose careers were honorable and successful—living refutations of the "blame it on the fates" doctrine so often relied upon by theorists and sentimentalists.

If I become a criminal and my brother becomes a gentleman and a scholar, a dutiful son, a truthful, useful citizen in the face of poverty and cramped conditions, in spite also of the fact that he was compelled to associate with me in his early years, I am not entitled to sympathy if I blame society "as it is now constituted" for making me a coward and a criminal. For I had the same parents, the same hardships, t'

same educational advantages that my brother had. It was not environment that made me a criminal. I am not a warped victim of unjust social conditions one iota more than my brother is. If I made the wicked man's choice of the primrose path and the thief's career, if I forsook duty and preferred stealing to working, I must not expect society to weep over my fate when I am led into a prison-cell or to a gallows-tree. In the United Kingdom, where criminals know that the cell or the hemp speedily follows the crime, there is less crime than in the countries where theorists plead for offenders.

In an address to a graduating class at Eureka, Cal., in 1913, the author of **By Right of Sword** said: "Do not permit anybody to poison you with the thought that society owes you a living, even if you fold your arms like a sluggard or select the criminal career of a forger or a burglar. So long as you shall believe that all work is bondage; that every man who gives you a job is your oppressor; that you are doomed to hopeless wage-slavery, and that civilization is a maze of never-ending tyrannies—you will likely become some kind of a parasite, a defective, delinquent, or dependent—possibly a tinhorn gambler, a race-track tout, a burglar, or a murderer."

CHAPTER I.

A Campaign of Blunders

THROUGHOUT the United States there is a determined effort, organized by opponents of the death penalty, to portray capital-punishment as a cruel relic of a wicked past. The organizations which oppose the death penalty for treason and murder are recruited from sundry elements of society—anarchists, sentimentalists, syndicalists, the I. W. W., many types of socialists, and the devotees of some new religious cults that are almost a unit in opposition to the gallows.

Scores of writers and speakers are already active in the campaign against the existing order. The Anti-capital-Punishment Society of America is in the field (1915) to overthrow the law of the ages, and the governor of a western state has become its president.

Hundreds of newspapers have been enlisted in the service, while many writers and speakers are engaged in describing the whipping-post, the rack, the thumb-screw, the "cat and triangle" of past ages as symbols indicative of "the brutal philosophy of annihilation," which they would overthrow by substituting the philosophy of love, so-called.

"Thoughtful Christians do not favor the death penalty, even though it be advocated by the Reverend Charles F. Aked," exclaimed a recent speaker, addressing a New York audience. She added a comment that indicates the line of argument now common, as fol-

lows: "Thoughtful Christians surely do not desire the death penalty. How can any one who believes in God, the creator of life, advocate the taking of that life which God himself created? Let the Christian read Matthew, vii, 1 and Mark, xii, 26, and he will have more respect for the thought, **Judge not, and ye shall not be judged; condemn not, and ye shall not be condemned; forgive, and ye shall be forgiven.** God himself, and God only, is the supreme arbiter, so all judgment should rest in him."

Of course this view is as extreme as any doctrine of non-resistance ever advocated by Tolstoy or the early Christians, as will be shown farther on. The followers of this cult do not seem to realize that its logical enforcement would disrupt the church, overthrow all governments, and leave the world the prey of the brutal and the vicious.

The citations are extreme examples of the misapplication of sayings that clearly **applied to individuals** with reference to their intercourse with their neighbors. It is said that some of those who now quote the words of Christ against the gallows, formerly deemed him a mythical personage. Such is the uncertainty of human belief!

In none of the great debates on the subject of capital-punishment have any of the contestants ever quoted the first twelve verses of Matthew or such texts as Luke vi, Romans ii, James iv, or Samuel xii, as being in opposition to the death penalty. In these portions of the Scripture, the idea, **Judge not, and ye shall not be judged**, in varying phraseology, has always been construed by the great commentators as having to do with persons having a tendency to become pharisaical

in their critical aloofness, therefore condemnatory in their opinions of their neighbors.

The "I-am-holier-than-thou" type were in the mind of Christ, who rebuked their critical attitude and their spiritual coldness. Similarly, Dante portrays the "frozen souls" whose impulses are wholly selfish. He banishes them to Lake Cocytus.

The Scriptures Are Misunderstood.

The Reverend John T. Shurtleff, Episcopalian, and the Reverend Robert A. Crichton, Presbyterian, contend that these quotations are wholly misapplied when used against capital-punishment and the penal institutions of lawfully constituted governments whose authority was never challenged by Christ.

Doctor James C. Gray, one of the most eminent of Scriptural commentators, says the texts concerning judgment, condemnation, and forgiveness become absurd if applied in such a way as to make them tolerant of wrong-doing. He concludes that the only rational meaning of these texts is that we are not to become self-constituted judges of others' faults.

Doctor Alexander Maclaren, prince of English commentators on the Bible, in his lectures construing the first twelve verses of Matthew vii, says: "How can we help judging, and why should we not judge?" He shows that Christ meant that we were not to become Pharisees, men of one-sided and uncharitable opinions, our minds fixed on the shortcomings of others, and forgetful of their virtues.

Doctor J. W. McGarvey, late president of Lexington Bible College, and an eminent commentator, says: "By its terms, **Judge not** is a universal prohibition, but we are also authorized to judge men by their fruits. Limit-

ing this paragraph by that, we conclude that only such judging as is not required by the actual conduct of men is here condemned." In other words, we must not judge from ill-will, or upon insufficient evidence.

It may seem superfluous to make further citations from the recognized authorities on Biblical texts, but since the abolitionists in some parts of the country are emphasizing the texts in question as being prohibitive of capital-punishment, it may be well to say that not one commentator takes their view. Some additional citations are submitted:

SOME AUTHORITATIVE COMMENTS.

The Reverend David Brown, of Aberdeen, Robert Jamieson, of Glasgow, and A. R. Fausset, of York, England, co-authors of an elaborate work of many volumes, based on the great commentaries of Henry and Scott, take the position that the thing condemned in the text under analysis (Matthew vii) is the disposition to look unfavorably on the character and actions of others, which leads to the pronouncement of rash, unjust and unlovely judgments upon them.

This view is upheld by Joseph Parker, the eminent London commentator, and by Adam Clarke, prince of expositors, who says that "these exhortations are pointed against rash, harsh and uncharitable judgments, the thinking evil, where no evil seems, and speaking it accordingly."

Lubyn Williams, the London commentator, says: "The Lord opposes the censorious spirit. The principle of your own judgment will be applied in turn to yourselves, and the censorious man is hindered in his work."

Dean Church likewise holds that "we must judge others, but not carelessly and harshly."

Parker's discussion of the texts of Matthew is exceedingly clear and complete. He says the text means: "Do not be bitter, do not be moved by the spirit of animosity and illiberality and uncharitableness. We must judge, in the sense of forming opinions and estimates of one another—that is not the kind of judgment which is forbidden in this exhortation by Jesus Christ."

Continuing, he says: "The spirit that is condemned here is one of self-righteousness, which condemns everybody who does not do exactly as we think should be done. The

spirit condemned here is that of infallibility. Find a man who makes himself the standard of everybody's conduct, who judges everybody by himself, and who gives license to his tongue in forming and giving opinions on such persons, and you will find the very man referred to in this exhortation. In so far as you are self-contented, self-pleased, self-righteous, in so far as you think it to be your duty to sit down upon the throne of judgment and to judge all your neighbors and the whole human race, that far are you guilty of the spirit of judgment which Jesus Christ condemns in this text.

"The man who thus judges is sowing seed which he will one day reap. You must give an account for every idle word. You shall be made to feel the bitterness of your speech, and the cruelty of your own judgment shall come back to you like a devouring flame."

In utter disregard of the context of the Scriptures, and oblivious of the opinions of eminent commentators and experts in the construction of Hebrew and Greek texts, such passages of Scripture as those just cited are erroneously invoked as Scriptural authority against the death penalty. It is becoming customary for superficial students of the Bible to assert that Christ abolished all the laws that existed under the Old Dispensation. This contention is elsewhere shown to be unfounded, illogical, and ridiculous.

Ancient Tortures Called to Mind.

Those who quote these sayings are fond of describing the tortures and floggings that were common during the pilgrimages of criminals from Newgate to Ludgate, and from Charing Cross to Westminster, in England, "when the hangman gave the condemned wretch a lash at every kennel the cart-wheel grated against." They ask why the modern advocate of capital-punishment hesitates to retain the scourgings and mutilations, the drawings and quarterings of the cruel past, which are vehemently declared to be a

logical part of the death penalty and its "wicked brutality."

We are reminded that prisoners were only recently bound in irons and crowded into dark, filthy, ill-ventilated dungeons. We are told how they were starved, beaten, and clad in rags. We are then asked why we do not advocate the same treatment now, since it was a part of the old custom of hanging.

The abolitionist then tells us that Beccaria, Romilly, Bentham, and many other great reformers of their time, were denounced as dreamers when they sought better treatment for prisoners, when they even demanded food, light, water, air, and clothing for the unfortunate. "As we are called ultra-humane to-day, simply because we want to abolish the death penalty," says one prominent writer on the subject, "so they were denounced for coddling cut-throats, pampering criminals, and making the jails too comfortable." There is no argument in such jumbling and juggling of facts and fancies.

So bitter are some of the abolitionists that they denounce almost everything that has come from the past, barely stopping short of Euclid's elements and Newton's law of gravitation. In their eagerness to sweep all before them, they forget the fact that the great reformers they quote, **stood stoutly for the gallows at the very time of their most important work of reformation.** The fact that Romilly and the select company of brave reformers of his time were careful to preserve the gallows for treason and murder does not seem to embarrass them in their argument.

An example of the activities of the foes of the gallows will suffice to indicate the line of their general attack. At Los Angeles, California, in July, 1913, a league was

incorporated "for the purpose of conducting a state-wide campaign in opposition to capital-punishment, a survival of the dark ages of human history." It is announced that similar organizations are to be incorporated in other states without delay. Governor Blease, of South Carolina, is pardoning everybody, while Governor Hunt, of Arizona, would preserve the life of every murderer in America.

One of the prominent Los Angeles daily newspapers, acting in a sense as spokesman for the League, says: "There is a practical unanimity of opinion in Los Angeles in favor of the movement thus enthusiastically launched for reform. Capital-punishment is simply murder, whether committed by society or by an individual. It violates the law, 'Thou shalt not kill,' and either hatred or revenge is invariably the motive of the state and the individual. The worst use to which society can put a man is to kill him, for death reforms neither him nor others. Society's concern is not with the individual, but with society itself."

These examples of opinions are sufficient to indicate the kind of arguments now being repeated throughout the United States. The word "reactionary" is invariably applied to those who maintain the present predominating system. To call capital-punishment a relic of barbarism is usually deemed sufficient to confuse its advocates.

Notwithstanding the assurance with which all sorts of superficial, erroneous, and sweeping statements are thus circulated, it may be maintained beyond all question that the abolitionists have not discovered any new and useful principle of penology, even if they do insist on labeling their plan as "the conception of modernity and humanizing penology." There is no short, logical,

and Christian route leading to such wisdom as the devotees of the new idea pretend to have found and tested.

PHILOSOPHERS FAVOR CAPITAL-PUNISHMENT.

Herbert Spencer, who was perhaps the greatest philosopher of the nineteenth century, patiently re-examined the foundations of learning. He had before him the data cautiously gathered during a long and active life of logical thinking. For him the past, as such, had none of the force of authority, as all know who have marveled at his bold disregard of orthodoxy in both religion and science; yet Spencer was not able to reason to a conclusion differing from the primal law enunciated in the Noachian code which, in one form or another, under sundry systems of government, has ruled men for countless ages, because an expression of universal truth, as the legitimate record of the sane verdict of all mankind. Similarly, Sir Leslie Stephen, reasoning from different premises, came to the same conclusion. Stephen, like Spencer, familiar with every ethical theory ever set forth, and withal a man of vast erudition, of philosophical mind, and gentle impulses, stood unwaveringly for the hangman as a necessity in extreme cases. His **Science of Ethics**, the result of more than thirty years' research, maintains the validity of the death penalty. The late Professor Ray Madding McConnell, of Harvard University, gave the world a masterful work in his **Criminal Responsibility**, the culmination of a career of scholarly research and brilliant achievement. He stands for capital punishment, as do scores of the most competent thinkers and masters of scientific research, men whose works on penology, psychology, ethics, and metaphysics are authoritative in the fields they cover.

The long array of geniuses thus defending an ancient penal system saw no rational way to abolish the gallows in the case of those wild beasts of men who wantonly destroy their fellow-men. No question should be decided on the mere authority of a great name, though the conclusions of eminent thinkers are always worthy of careful consideration. Now, if the masters of philosophy, psychology, ethics, theology, and sociology have failed to find that the death penalty is a relic of barbarism, therefore out of place in this age, why should we accept the off-hand and superficial pronouncements of editors and politicians concerning the proper course to take in the case of the deliberate murderer? Why should we rashly reverse the judgment of history and substitute a policy of lenity out of all proportion to the awfulness of the crime under consideration?

Ex-president William Howard Taft made a searching study of the effect of the death penalty on society and crime. As a Federal judge, as secretary of war, as governor-general of the Philippines, and as president of the United States he was frequently in an official position that invoked his conscience and his judgment. In response to an inquiry from the author of *By Right of Sword*, under date of July 22, 1913, Mr. Taft writes as follows: "I have no hesitation in saying that I think the abolition of the death penalty is a mistake, and my impression is that the states that have tried it have found it to be so. It is certainly a deterrent for crimes of bloody violence, and I don't think we have reached the time when we can afford to dispense with it."

As a mere opinion, this expression of the former president's is certainly entitled to more weight than

the opinion of an editor or other private citizen of limited experience with the administration of the law and the handling of criminals.

Yet an increasing number of persons are being lured into the belief that society has no right to take the lives of its most vicious and abandoned members, the premeditated murderers who infest the land in increasing numbers, plying the trade of "murder as a fine art," as De Quincey has suggested.

There appears to be an increasing reverence for the life and happiness of the totally wicked enemies of society who commit deeds of shocking violence. Women of refinement shed tears over men who have violated and slain tender girls. Petitions are signed and "movements" are started in behalf of wretches whose hearts are void of social duty, and whose minds are fatally bent on mischief—fiends beyond all hope of reformation, even if reformation were the prime object of punishment, as sometimes asserted by the reformers.

But there is no valid basis for the utopian belief that the life of such a murderer should be spared, and even deemed more sacred than the life of his victim or the safety of society, whose laws he has broken with impunity. From the viewpoint of justice, logic, and expediency, sanctioned by the highest conceivable ethical ideals, **society is warranted in ending the life of any member thereof whose presence and example are a menace to its safety.**

Those who make impassioned appeals for the murderer, usually in the name of mercy and under the influence of a sublimated conception of duty, or under the belief that they have been **commanded to love all created things**, make no effort to answer the stern arguments of expediency and ethical justification.

These arguments, placing the safety of the whole above the safety of any of its parts, have withstood the experience of ages, in all climates, under all flags and religions, and among all ranks and conditions of men.

NO NEW LIGHT ON THE SUBJECT.

The claim that a great light has been seen in recent years, that a new and marvelous treatment for murder has been discovered, is invalid and worthless. We are dealing for the most part with the same old human nature that has been the riddle of all governments and all systems of philosophy. Good and bad, joy and sorrow, Cain and Abel—these, along with the rewards of the just and punishment of the wicked, are still interwoven with the life of man on this globe. So long as one diabolical assassin lives to plunge his dagger into the kind and loving heart of wife or child, to slay an honest neighbor for his weekly wage, or to poison his foe for revenge, the drastic law applies; and society is justified, by every consideration of humanity and expediency, in taking the toll of the murderer's life. As Henry L. Oldham has said, "Let us abolish the death penalty, but not until the murderers first abolish it."

A Great Philosopher's Views.

Sir Leslie Stephen wisely reminds us (*The Science of Ethics*, page 444) that "the great forces which govern human conduct are the same that they have always been and always will be. The dread of hunger, thirst, and cold; the desire to gratify the passions; the love of wife and child or friend; sympathy with the sufferings of our neighbors; **resentment of injury inflicted upon ourselves**—these and such as these are the great forces which govern mankind. When a

moralist tries to assign anything else as an ultimate motive, he is getting beyond the world of realities. My desire for the welfare of my race grows out of my desire for the welfare of my intimates."

In the light of such conclusions, every man who considers the murder evil, should exercise his imagination to the extent of putting himself in the place of the victim's family and friends. Let him suppose that the person murdered had been his own relative. It has been said by a trial judge of wide experience that it is impossible for any kind and just man, with the red blood of a civilized being in his veins, to contemplate without emotions that demand redress, the wanton slaying of his wife, mother, or child.

It was because of the cry for redress that the murderer was tried, in olden times, by those who witnessed his deed, and the relative was permitted to avenge the crime with his own hands. But society took that right away from the relative, under its solemn promise to carry out the law. The modern abolitionist, however, would leave the bereaved relative to ponder over the wisdom of sparing the slayer's life, consoling him with the thought that society is carefully protecting the murderer from harm, in a modern "prison hospital for the victims of heredity."

This expensively maintained home of peace and rest, from which the murderer always **has an opportunity of escape**, either by parole, pardon, or killing a guard, is to be maintained at public expense. The family of the murdered man is forced to contribute taxes for the murderer's comfort. The reformer would see to it that the murderer always eats and sleeps in comfortable quarters. In some states the stigma of wearing stripes has already been removed. Cadet uniforms, for example,

have invaded Californian prisons. The new plan would see that the murderer is well groomed and fed, housed and entertained.

Under this conception Retributive Justice is robbed of her sword, punishment is denounced as a relic of the cave-dweller, the law of love is invoked, and the process is labeled "the scientific treatment of the unfortunate, under modern conceptions of penology." This is the work of tyros!

Since the normal man of good impulses shudders at the thought of inflicting pain and death, he is glad to welcome any substitute thus proclaimed as an improvement over the hangman. In an easy-going way the person appealed to by the abolitionist soon signs a petition and promises to vote against capital-punishment.

It is unfortunate that so few persons ever stop to challenge the advocates of the sentimental theories that reject the gallows. The masses are busy with their own affairs, however, and the question is dismissed with the thought that the world is growing better. Kind men and gentle women weep at the thought of hanging a murderer, forgetting, in their eagerness to avoid the shedding of blood, the victim of the murderer, whose blood was innocently shed, his immediate family, the wrong that society has suffered, and the encouragement that the lenity they would substitute would afford to other criminals. Unfortunately, the world abounds in monsters who laugh at prison locksmiths and pardoning boards, fearing nothing save the gallows, and hardly fearing that, in view of the organized activity of its many foes in churches, clubs, and drawing-rooms.

"In this age of superficiality and fads," says Professor Peabody, "it is easy to start almost any theory and gain converts to it. Only a few years ago an old man in the State of Washington threw off his clothing, proclaimed himself the Messiah, and won a large following. He was later slain by a brother of the young woman whom he had led into debauchery, and the deluded woman later slew her brother, while he was taking her back to the home of their parents."

Several years ago, in a similar way, a Western editor started a spectacular crusade against penitentiaries, criminal codes, and the gallows in particular. It was not long before his office was thronged with a motley crowd of virtuous and sympathetic women, ex-convicts, dissolute men, and the advocates of "love and lenity as the sole basis of the only prison discipline compatible with civilization." Those who believe in the death penalty were characterized as reactionary and anti-social enemies of mankind. Strange as the fact may seem, the war thus started has become so vigorous that society is permeated with the advocates of abolition.

MILLIONS ARE STILL SANE.

The fact remains, however, that millions of prominent men and women—ministers, editors, teachers—stand stoutly for the death penalty in extreme cases. This is the view of many of the kindest and gentlest, the sanest and best men and women in every community. They know that the death penalty has the sanction of the great moral instructors of every age. They know, too, that it has had the sanction of the wisest and best of mankind, and that it is justified by law and logic, by history and criminology, by the highest ethical

standards, and by the very laws of life itself.

Without the right of self-defense and governmental severity the world would long ago have become the prey of brigands and poisoners. If self-preservation be a right and a duty, as Herbert Spencer has said; if the preservation of society be more important than the life of any one of its corrupt units, then is the gallows sanctified by long use and by the doctrine of the greatest good to the greatest number.

The general welfare is more important than the fate of an evil-doer. The sword must remain as a symbol of law and order. It must so remain for the safety of society, in spite of the attacks that are made on the hangman, who is portrayed in his accidental carmine, rather than as an incarnation of one who "beareth not his sword in vain," but as a minister of righteousness.

The foes of the gallows emphasize the fact that the murderer is a victim of fate. He should be fed and clothed at public expense, maintained in a sanitary prison, and entertained by orators and musicians, because it was his misfortune that he was not born a poet or a philosopher.

Ed W. Howe, the eminent author of *The Story of a Country Town*, writes as follows in *Howe's Monthly*, Atchison, Kansas:

Punishment is as necessary as reward. The boy who brings in wood promptly is rewarded by his mother; his brother who neglects his chores is slapped. The same principle is carried out in every walk of life. It is as necessary to hang some men as it is to honor others. Thousands of men are industrious and well-behaved because of punishment. The present craze to be good to convicts and fallen angels is wrong; not that the state or the community enjoys punishing the evil-doer, but because it is as necessary as rewarding a good man for good conduct. Spare the rod and spoil the child sounds like brutal doctrine, but it is sound. Whenever truth and common-sense are crowded out by sentiment, unnecessary trouble results.

Those who insist that capital-punishment is a rational and necessary penalty in an age that produces brutal (even professional) murderers, are not more unkind than those who maintain that the present generation should preserve the lives of murderers because they are the innocent victims of heredity and environment.

Survival of the fittest is nature's way, harsh though that way may seem. The preservation of the weak elements, of the dangerous and the degenerate, can never lift society to a higher plane. With beak and claw, talon and club, hoof and horn, the warring forces of life have fought their battles through thousands of generations. The elimination of the murderer because of his unfitness for social life is in the line of "manifest destiny and benevolent excision."

We have become civilized to the extent that the man who desires to slay his brother should be told in plain terms that the penalty for his crime will be death. This is neither the stone age nor the age of cannibalism, but we who desire to enjoy life, liberty, and the pursuit of happiness in order that we may pursue the serious and thoughtful work of the world, must rid ourselves of the murderer and his tax on industry. We must purge ourselves of him and his offspring, not by preserving him in luxuriously furnished penitentiaries with grand opera and Sunday school annexes, but by the swift and certain way of the old law. We must teach all men that there is **too much cant about the sacredness of human life in general**, since the life of no individual of the human species should be regarded as sacred unless it is **made sacred by respecting the lives of all other human beings**.

If a man would have his life regarded as sacred, let him look upon the lives of others as sacred. A man

should be made to understand that on no other terms may he have a lease of life. If it be a man's misfortune to be born a murderer, let that misfortune be charged to his ancestors, to fate, or what not; but let him understand once for all that the same fate that made him a murderer metes out to him the murderer's just punishment—annihilation.

“So many agitators are now urging the abolition of capital punishment,” says Attorney A. J. Monroe, “that one might suspect that a new panacea for murder had been discovered, though such a conclusion would be wholly invalid; and so many voices are calling the death penalty a relic of barbarism, which it is not, that the public is likely to forget, if it ever knew, that the Christian doctrine, **Whoso sheddeth man's blood, by man shall his blood be shed** (Genesis, ix:6), came as a blessing to our ancestors of the North, who had long been degraded by the custom of paying blood money to the families of murdered men, the murderer thereby escaping further punishment than the fine. This fine was arranged in advance by schedule, the fee varying with the social rank of the person killed. This custom is described in historical works, legal treatises, and in the encyclopedias.”

The fact that Christianity overthrew the early Teutonic and Celtic law, is forgotten. The Northern pre-Christian law permitted the murderer to make amends to society and the friends and relatives of his victim by the payment of blood money. One who desired to become a slayer, either for revenge or any other wanton and wicked motive, could consult the scheduled value of his intended victim, commit his crime, and expiate for his offense by paying the monetary price. This blood money custom flourished in semi-barbaric times

and later among Scandinavian and Teutonic races. Christianity introduced the Noachian code, which demanded the forfeit of the murderer's life. This is history, in spite of the fact that the abolitionists would make us believe that the gallows was erected by the cave man. See the latest edition of the **Encyclopedia Britannica**, volume iv, page 85.

SOME CRIMES WERE BOTLESS.

But even under the reign of the blood money law, some crimes were "botless," that is, **not to be settled for with money**. Some offenders might be killed by their foes wherever found, namely: one who had slain another in a church, or while the victim slept. Such murderers were outlawed.

Before society took charge of the execution of murderers, individuals were usually permitted to kill those who had slain their relatives, under the doctrine that such an "avenging of the blood" was the proper justification of the deep-seated feeling of human resentment which has in all ages been righteously felt toward murderers.

In his remarkable volume entitled **Law: Its Origin, Growth and Function**, the late James C. Carter, undoubtedly the foremost American lawyer of the nineteenth century, says (page 42) that "the payment of a sum of money or the delivery of property to the family of a slain man was the method of expiating for murder in the past." He says we find a custom established everywhere in barbarous society of the payment of a fixed sum by the family of one who had slain another to the family of the victim by way of compromise for the injury. He maintains that it would be true to say that "we know of no race or tribe of

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men in the past who, or whose ancestors in the case of civilized people, did not have this custom, nor any now barbarous tribe which does not have it. We do not find it at the time of the earliest historical accounts of Greece and Rome, but those accounts do not reach back to the barbarous times of those nations."

The Laws of Solon and the Twelve Tables of Rome were regulations for peoples who had for centuries emerged from a state of barbarism. Carter does not doubt that the custom prevailed among the Greeks and Romans antecedent to the selection of regular magistrates to declare and execute the law. In the poems of Homer there are many evidences that the custom obtained among the Greeks. The Latin word *poena* originally signified the price, or composition, by which the crime was expiated. The Germans, our own ancestors, were found in this condition of barbarism within historic times, and Tacitus informs us that all crimes were compounded by the payment of cattle. Among the Iroquois Indians compounding was the custom. Among the Maoris every offense except murder had a pecuniary equivalent. It is thus seen that the death penalty did not originate in barbarous times. The idea of taking a human life in atonement for the wanton slaying of a human being belongs to a spiritual and social development unknown to barbarians. The feeling that murder unpunished, or punished lightly, is a violation of the moral order of the universe belongs to a philosophy and an ethical conception incapable of comprehension by a depraved or brutal people.

PRIVATE REVENGE BAD.

The Corsican vendetta and some of the bloody feuds common in the Southern States of the United States are

survivals of the barbaric view of crime and its punishment.

"The desire to resent wrong is so strong in human nature," said the late Judge Henry S. Kelley, a writer on criminal law, "that blood revenge is almost the first impulse of every manly man whose mother, wife, or child has been wantonly slain. If the law is inoperative or lenient, private violence at once abounds and lynchings increase."

All human experience has justified the death penalty for certain crimes. In Babylon (2285 B. C.) the death penalty was unquestioned for murder, and the Roman law followed it, though Christianity for a time mitigated the severity of the older codes.

Can the bulk of human history be wrong in its judgment that desperate murderers, like venomous reptiles and wild beasts that prey on men, should have no place in the society of peaceful men? We do not slay the man-eating lion and tiger because of hatred, wicked revenge, or the desire to make them suffer, but because their removal is necessary to the safety of men. Either the man-eating beasts or we must abandon the country. But a cold-blooded murderer, having cunning intelligence without moral restraint, is infinitely more dangerous than any species of animal on the globe. Why slay the tiger and carefully preserve the human beast?

Those who would substitute life imprisonment and an elaborate system of schools, exercises, and curriculums of moral training, at grave danger and excessive cost to society, overlook the fact that all experience shows that life imprisonment does not become life imprisonment in fact.

After persons and situations have changed, or under

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the sway, perhaps, either of weak or corrupt governors and pardoning boards, many murderers have been set free as reformed. The alarming fact in connection with this policy is that more than two-thirds of the habitual criminal class become recidivists, and as such are returned to confinement. Many others, returning to criminal careers, doubtless escape detection and conviction. Furthermore, the man in the cage is a serious problem and an increasing menace to society, both while in the cage and after he is set free.

It is argued that **no punishment can restore the life of the murderer's victim.** True, but the death of the murderer secures society against him. His elimination is justified on the ground that it is the duty of government to protect the lives of the innocent by the utmost means at its command.

In further answer to the contention that capital-punishment does not restore the life of the murderer's victim, it may be said that neither does any other punishment make such restoration. **If restoring the dead to life is to be the test of the validity of punishment, then why punish a murderer at all?**

If it be said that society has no moral right to take the life of a human being, then it is equally true that society has no moral right to take away a man's liberty, or to inflict pain by imprisonment. Society can not restore the life of the murderer, **nor can it recall the vanished years and restore to a prisoner the time he has spent in prison.** In principle, there is no difference between the right to take away a man's life and the right to rob him of his freedom. The fundamental ethical principle underlying this view of the case is elucidated by Herbert Spencer in

his **Social Statics**, in his **Data of Ethics**, and in sundry of his scientific essays.

Chancellor Kent, one of the greatest writers on the principles of law, wrote a brilliant justification of the gallows. Like Daniel Webster, who often asserted that society was justified in administering capital-punishment, Kent was a kind and learned man. Like Webster, too, he was familiar with history and human nature—the same human nature that exists to-day, except that the criminal class, “pampered and unpunished,” as a brilliant Minnesota attorney has said, “is bolder and probably more numerous in this State than ever before.”

WEBSTER'S CLEAR EXPOSITION.

In the course of his famous speech in the Knapp murder trial, Daniel Webster laid down the principle of punishment as follows:

The criminal law is not founded in a principle of vengeance. It does not punish that it may inflict suffering. The humanity of the law feels every pain it causes, every hour of restraint it imposes, and more deeply still every life it forfeits. But it **uses evil as the means of preventing greater evil**. It seeks to deter from crime by the example of punishment. It restrains the liberty of the few offenders, that the many who do not offend may enjoy their liberty. It takes the life of the murderer, that other murders may not be committed. The law might open the jails and at once set free all persons accused of offenses, and it ought to do so if it could be made certain that no other offenses would be thereafter committed; because it punishes, not to satisfy any desire to inflict pain, but simply to prevent the repetition of crimes. When the guilty, therefore, are not punished, the law has so far failed of its purpose; the safety of the innocent is so far endangered. Every unpunished murder takes away something from the security of every man's life. **Whenever a jury, through whimsical and ill-founded scruples, suffers the guilty to escape, they make themselves answerable for the augmented danger to the innocent.**

CHANCELLOR KENT'S ANALYSIS.

Chancellor Kent (*Commentaries*, Vol. iv, page 625) discusses the question as follows:

The punishment of death is, doubtless, the most dreadful and the most impressive spectacle of public justice; and it is not possible to adopt any other punishment equally powerful by its example. It ought to be confined to the few cases of the most atrocious character, for it is only in such cases that public opinion will warrant the measure, or the peace and safety of society require it. Civil society has an undoubted right to use the means requisite for its preservation; and the punishment of murder with death accords with the judgment and the practice of mankind, because the intensity and the violence of the malignity that will commit the crime require to be counteracted by the strongest motives which can be presented to the human mind.

Grotius is decidedly of the opinion that capital-punishment is not only lawful, in certain cases, under the divine law, but indispensable to restrain the audaciousness of guilt.

In spite of such views, the abolitionists represent the advocates of capital-punishment as bloodthirsty dervishes howling for revenge, and even eager to cause suffering. All kind and gentle men and women regret that murderers stalk abroad. They regret, too, that even murderers must be punished by drastic measures that offend the finer sensibilities. There are cases, however, when "the parlor and the study-window view of life" must give way to the sternness of the judicial judgment, under which, at times, lenity is the height of folly. Our conduct toward offenders, under any rational view, must be determined, in the greater measure, by their conduct toward us, unpleasant as this conclusion may appear when discussed at an afternoon tea, or in the presence of the young women of a boarding-school. Like many other unpleasant questions, that of capital-punishment gives rise to feelings of painful regret, especially if those discussing it are persons of refined natures.

But the most just, refined, and perfect man, unalterably opposed to the infliction of pain on transgressors, deeply enraptured with utopian theories of non-resistance, would become embarrassed if he should attempt to carry out his ideals among a tribe of head-hunters or cannibals in the South Sea Islands. That song from "The Mikado," which "makes the punishment fit the crime," carries the correct philosophy. In taking preventive measures that fit the necessities, one contemplating a tour of some of the Philippine Islands would be exercising common-sense without violating the highest ethical standards. In other words, **our conduct toward offenders is determined by their conduct toward us.** Among footpads and assassins, who recognize only the law of might, cunning, and brutality, the person who invokes only the law of love, the "resist not evil" theory, must be destroyed. Similarly, **a penal code that makes lenity and forgiveness the basis of its punishments, must prove worthless.** For cogent reasoning in support of this view, consult Herbert Spencer's **Data of Ethics**, page 280.

EMERSON ON WHINING LOVE.

Emerson says, "we must teach the doctrine of hatred when love pules and whines." The Reverend John W. Chadwick has amended the Emersonian dictum by suggesting, "not the doctrine of hatred, but of the terrible things in righteousness, the sternness of the moral law."

Fear can not be banished from consideration in the affairs of men. It is a particularly powerful influence on the criminal mind, which is not amenable to the higher ideals. It has been said that fear of

parents is the beginning of goodness—fear of their punishment, displeasure, blame, disappointment, and grief. These are a brace and moral spur. The manly man would not bow down in shame the heads of “the old folks at home,” or bring his parents with sorrow to the grave on account of his misconduct. Fear of one’s fellows, of the shame and disgrace of drunkenness, of the weakening of the vital forces, the pain and suffering of disease, is a deterrent that holds many men in paths of rectitude.

“If the punishment of pain and disease were not the natural results of a dissolute life,” says a prominent physician, “the world would plunge into excesses unknown to-day, for as Emerson has said, God made man with passions strong, in order that the race might be perpetuated, even at the risk of wrecking the occasional individual. Fear is everywhere a restraining influence.”

Fear of the future makes men frugal, makes the world industrious. Fear of the disapproval of parents, friends, public opinion, coupled with that fear of an accusing conscience that makes cowards of us all—this has a restraining force the very opposite of love. Nor does fear work on the minds of the vicious only. Even the gentlest and best persons are disturbed by it. In truth, highly moral persons fear the frowning disapproval of society for misconduct, and the fear is in proportion to their refinement, whereas the criminal knows no such fear at all. For him the deterrent force must be more violent than public opinion.

DEATH IS THE KING OF TERRORS.

There is a large type of low-minded criminals to whom fear of death may be said to be the only vivid

and restraining picture sufficient to determine their conduct. Death is pre-eminently the king of terrors to men of this type. For such conditions as the depraved murderer presents we need Carlyle's "hangman's whip to hold the wretch in order." To some minds, "the hell of physical misery, degradation, defeat, and death" is the only symbol that frightens from the career of crime. Dante, Milton, and Shakespeare, alike with the thundering texts of the Hebrew Scriptures, deal with human nature as it has been, in the main, since recorded time. Consult Wallace in index.

"Against some people, in short, the only effective arguments are the gallows or the prison," says Sir Leslie Stephen in his **Science of Ethics**, page 413.

Herbert Spencer warns us that we can not extract golden conduct from the essentially leaden instincts of humanity, especially from the depraved instincts of the criminal type. So long as the world is cursed with fiendish murderers who count on the law's delays, the lenity of courts and juries, the policy of "painless punishment," and the misapplied doctrine of non-resistance, under a prison system that supplies either a Tetrizzini or a Bernhardt "to relieve the loneliness of congregate prison life," as one advocate urges, just that long will murderers go unwhipped of justice, committing crime after crime with increasing freedom from chastisement.

It is the **certainty and swiftness** of capital-punishment for murder that makes Great Britain and her colonies the countries where the fewest murders in the world are committed to-day. It was the manifest inadequacy of life imprisonment for murder that caused France to restore the guillotine, that restored the

gallows in Iowa and Colorado, and that is to-day causing a movement for its restoration in several other states. It was the swift and certain punishment administered by the old Vigilance Committee, after the courts had broken down, that stopped the carnival of brutal murders that disgraced San Francisco in 1856. The authors of *The Annals of San Francisco* tell us (page 567) that "not one criminal had been executed, though it was notorious that at this period at least one hundred murders had been committed within the period of a few months."

WHEN HANGINGS DECREASED CRIME.

Under such circumstances there was no opportunity to check criminals by applying the doctrine of brotherly love and non-resistance. Even eminent ministers of the Gospel urged the stern men of those days to take drastic means to check crime. Just what resulted, is thus told on page 585 of *The Annals*:

"The fate of Jenkins, Stuart, Whittaker, and McKenzie showed that rogues and roguery, of whatever kind, could no longer expect to find a safe lurking place in San Francisco." Again, on page 582, thus: "In consequence of the examples made of Jenkins and Stuart (who were publicly hanged), crime was now fast diminishing in San Francisco, and the number of notorious criminals was much reduced."

The authors describe how the press, the pulpit, and the grand juries openly defended the action of the Vigilance Committee, on the doctrine that expediency warranted the unusual procedure. There was an urgent need for the protection of the lives and property of the innocent. The community was swiftly purged of its worst members. Those who were not hanged,

hastily escaped from the city. The example was in every way salutary and has been justified by eminent thinkers as excusable by reason of the corruption of the courts and the failure of the regularly constituted authorities to enforce the law.

Almost every great reformer of the past maintained that the death penalty was justified in extreme cases. Those who corrected abuses of courts and prisons, pleaded for an extension of the law of love, and repealed obnoxious laws, still left the murderer to his fate. Though Solon and Lycurgus repealed the harsh laws of Draco, they preserved the Draconian punishment for murder. Though Sir Samuel Romilly and his illustrious associates cut the list of capital offenses from several hundred to four, they reserved the right of sword in the assassin's case. Like the Greeks and the Romans, except during a brief period of disastrous lenity in Rome, the British law-givers have always stoutly refused to abolish the gallows for the murderer. Lord's **Beacon Lights of History**, Vol. iii, pages 29 and 69, and the old edition of the **American Encyclopedia**, Vol. iii, page 144, give some interesting facts in this connection.

Goldsmith makes the Vicar of Wakefield say: "In cases of murder, the right of capital-punishment is obvious, as it is the duty of all, from the law of self-defense, to cut off that man who has shown disregard for the life of another."

This view has been supported by Bentham, by Sir Samuel Romilly (1757-1818), by Basil Montagu, Mackintosh, Sir Robert Peel and his associates, the eminent British prison reformers who were famous in their generation.

The United Kingdom's Royal Commission worked

diligently from 1864 until 1866, studying the history of capital-punishment and the world's prison systems, then reported in favor of retaining it for treason, deliberate murder, and some other crimes. Neither human nature, the fundamental principles of penology, nor the character of murderers can be shown to have undergone the slightest organic change since the British Commission made its illuminating report.

Sir James Stephen and Charles Kingsley favored capital-punishment and wrote a series of discussions on the subject. **The Encyclopedia Britannica** says: "It certainly seems strange that the community should feel bound carefully to preserve and tend a class of dangerous criminals, and give them, as Charles Kingsley says, 'the finest air in England and the right to kill two jailors a week.'"

The logic of this remark has not been answered by any of those who propose new and dangerous experiments in penology.

NOT TOO CIVILIZED FOR GALLOWS.

It is sometimes argued that the human race has become so civilized, its character so much improved in these modern times, that the gallows is a grewsome and useless survival from remote times when the character of mankind was essentially cruel and depraved in comparison with its present sublimation. In a country like America, where life and property are unsafe in almost every hamlet and city in the Union, where footpads and burglars abound, and where there are from seven to ten thousand murders a year, most of which are not punished at all, this is a strange statement.

Those who lightly imagine that because Abraham

Lincoln's age freed the slaves of the South we have become angelic, should read Alfred Russell Wallace's **Social Environment and Moral Progress**, written by the great evolutionist when past ninety years of age. Here is a man who had been an observer and a great scientist for almost seventy years, yet his indictment of the age is terrific. Coming from Darwin's contemporary and the co-discoverer of the principles of evolution and natural selection, the work is worthy of attention. It is certainly an illuminating reply to the baseless assumption that this age has outdone all other ages in moral achievements and conceptions.

Wallace concludes that the permanence and high type of intellect and the standard of moral conduct have been maintained from the earliest ages of which we have any knowledge. Even savages are our equals in moderation, candor, reasoning powers, and respect for the rights of others, as shown by the records of travelers the world over.

Euclid and Archimedes were the equals of the greatest mathematical intellects of any age of which we have knowledge, while Moses, Solon, and Plato knew as much about right and wrong and about ethical ideals as is known by anybody on the globe to-day; so the great Wallace concludes: "There has been no definite advance of morality from age to age, and even the lowest races, at each period, possessed the same intellectual and moral nature as the higher. **The essential character of man**, intellectual, emotional, and moral, is inherent in him from birth; but its manifestations in conduct can be modified in a very high degree by the influence of public opinion and systematic teaching." See Wallace, page 45.

If public opinion gives all the sympathy to the mur-

derer and teaches that he is "a victim of the ages" he will soon look for his turkey dinner every day, rather than be content to wait for a newspaper to give it to him on Christmas, in addition to having an editorial on his case every afternoon.

Instead of being advanced too far for the gallows, says a noted writer, our inhumanity, our cruelties, and immoralities—adulterations, briberies, forgeries, and crimes of violence—all these invite a more drastic code than we have ever known. Wallace denounces our immoral and wicked social environments, our insatiable trades, our competitive and wicked economic blunders, and our lack of brotherly co-operation. He shows that painful and disfiguring diseases spring from poisoned surroundings; that men, women, and children are over-worked and under-paid; that millions die from preventable causes; that race degeneration and sexual immoralities abound, so he concludes thus: "It is not too much to say that our whole system of society is rotten from top to bottom, and the social environment as a whole, in relation to our possibilities and our claims, is the worst the world has ever known." This conclusion is certainly as close to the truth as the random guesses of those who flippantly assert that the present century and this country carry the weight of all the virtues on the shoulders of more perfect men than have ever before graced the planet.

In his work entitled **Character and Life**, Wallace shows that there is no proof whatever of any real advance in human character during the whole historical period, also that there can be no progressive improvement in character without some selective agency tending to such improvement. Since he and Darwin jointly discovered some of the great laws

governing human development, and since his standing in this line made him a leader for more than half a century, his judgment can not be lightly elbowed aside.

He tells us that the Vedic Hymns and the Hebrew Scriptures contain teachings as lofty as any in human history. It might be noted that the death penalty was in vogue among the people who produced the Hymns and the Scriptures referred to by Wallace. Socrates and Plato, about 400 B. C.; Confucius and Buddha, one or two centuries earlier; Homer, earlier still; the great Indian epic, the Maha-Bharata, about 1500 B. C.—all these and the splendid peoples of antiquity who were contemporary with their authors, afford evidence of intellectual and moral character equal to our own, and absolutely such as to settle the claim as to our great morality and intellectual advancement as compared with the ages when the death penalty abounded. The wars and crimes abounding among the ancients were not any worse than our own—no more shocking than Europe in arms in the year 1915, or than the twentieth century United States of America, already cursed with unpunished murderers in every direction, about to give them still greater freedom from molestation.

Without pressing this question further here, it may well be said that the boasted assumption that the present age has advanced so far beyond other ages in moral ideals and upright conduct that the death penalty stands out as a relic of barbarous and cruel times, is simply ridiculous. The death penalty is not a survival from times inferior in morals and baser in conduct than our own age. The Noachian covenant was made with a great and good people. The death pen-

alty is to-day strictly enforced in England, and the English people are law-abiding, civilized, and upright. Furthermore, they do not "whip out revolvers and shoot men on slight provocation." Nor do the Germans, the French, and many other nations where the ancient law has long been enforced.

ROMAN CATHOLIC SAVANT SPEAKS.

Although the Biblical arguments are treated exhaustively in another chapter, it is deemed advisable to give a short and clear statement of the Roman Catholic view here, though the reader should consult the chapter entitled **Christianity Justifies the Death Penalty**.

The Reverend Father Jerome S. Ricard, noted astronomer and former professor of the chair of ethics, mental and moral philosophy, at Santa Clara, Cal., University, writes as follows:

My Dear Mr. Irvine: This question is thrashed out by all our philosophers and theologians in accordance with the Old and New Testaments and the fundamental data of reason. Whatever commentaries you may be able to get on the New Testament will only reaffirm what you have already stated or quoted.

1. It is certain that the Almighty has conferred on the state the power needful for its existence, prosperity, and perpetuation. Whenever, therefore, capital-punishment is necessary to secure these ends the state has the right to use it.

2. It is certain that the state has the duty and the right to determine and inflict whatever punishment is deemed necessary to keep order and peace and security in society. Nothing can deter certain malefactors except capital-punishment. The prison is only a sweet recreation for certain obdurate rogues; therefore the state has the right to threaten, and therefore inflict capital-punishment.

3. What all people everywhere and always have done in this regard is the verdict of universal reason. Such a reason is infallible as the emanation of the divine Reasonableness.

4. Demerit, in the nature of things and to preserve the equality of rational creatures, must be met by a return in kind or equivalent. Hence the legislator whose law has been violated by a malefactor and who must see that it is observed is the proper person, and the only proper person, to provide that such a return be made, and to appoint the manner in which it shall be made, which may mean, in some cases, capital-punishment. [This prevents vendettas.—Editor.]

5. As to the so-called law of love, Christ only emphasized the plain and rational duty of loving our fellow-man and even our enemy, because he is a man, and as such the image of God, physical, not moral, though he may be that, too.

6. Whatever is moral law in the Scriptures, Christ not only did not abrogate, but came to fulfill. What he did abrogate are only the paraphernalia of positive law, which is as changeable as the circumstance and the particular situation that dictated it. Witness the doings of some of our immortal legislatures! What Christ meant is Rational Love, not the sickly sentimentality of certain types of men and women. Now the best, the most rational love that we can give our neighbor is to whip him, if necessary, into keeping the ten commandments. Any other course will at times be only weak foolishness.

7. Capital-punishment has, I am sure, saved many a soul that otherwise would have gone down to the lowest hades, this by the sheerest metaphysical necessity and despite the intensest love God has for all his creatures.

8. What you say about the fifth commandment is absolutely true. Thou shalt not kill is only an abbreviated formula for Thou shalt not kill without sufficient cause. By the way, the ten commandments are only a reaffirmation of the natural law, which God ideated posterior to his decree to create the world, and which he promulgated to

creatures when he made them leap into existence, the manner of the promulgation being according to the creature's capacity to receive it—by determination to the unfree, and by way of natural knowledge to the intelligent and free. This natural law is immutable (it is the Fate of the old pagans), and Christ was no more capable of changing it than God is capable of contradicting himself. There is, therefore, nothing new in the New Testament beyond a revelation of the Trinity, a clearer knowledge of heaven and hell, the incarnation of the Son of God to save man, the seven sacraments as means of grace to the sons of God and, as such, heirs of the Kingdom. All else is only a re-affirmation of the natural law which, in the course of ages, had become corrupted. Sincerely yours,

J. S. RICARD.

We hear much talk these days to the effect that "the state is not authorized to murder a murderer because the murderer slew his victim;" also that "hangings are legalized murder." These superficial comments belong to the category of calumny, and those who repeat them with tiresome iteration fail to see that there is no argument in "calling names." The phrase **legalized murder** is a contradiction; if it is **legalized**, it is not murder, and if it is **murder**, it is not **legalized**, that is, sanctioned by law.

The **Standard Dictionary** clarifies the situation by defining murder as the **intentional killing of one human being by another, without moral right or legal authority**. Why not stand by the definition?

Under the Old English Law, murder was the secret killing of one human being by another—homicide privately perpetrated, no one being present to see or hear it done. The element of secrecy is not necessary under modern law, nor was it necessary under the Common Law. All now required to constitute murder is for a rational human being to kill another with

premeditated malice and deliberation, without legal cause.

If the slaying thus defined is done by a person of sound mind, the crime being preconceived and committed after due reflection, as by poisoning or lying in wait, then it is murder.

If the critics of the existing order were to say that **hanging is legalized homicide** (also justifiable), they would be within the limits of truth. As well say that the killing of an irresponsible man-slaying maniac by a policeman who shoots him to save innocent lives is **legalized murder**, as to say that legal hangings are murder.

In San Francisco some years ago a violent maniac bought a repeating rifle, stood by an open window and slew several pedestrians before a policeman's bullet ended his life. Did the policeman commit legalized murder? We heard no outcry against him, and nobody quoted **Thou shalt not kill** as an evidence that the policeman was a murderer. Nobody called his attention to **Love thy neighbor as thyself**, nor yet to **Judge not, that ye be not judged**, although the policeman certainly both rendered and executed summary and wholly justifiable judgment in the case before him. Maudlin pleas for human life in general, regardless of **overpowering necessity and our duty to end some lives**, become little less than idiotic.

Common-sense and the policy of the greatest good to the greatest number often lead to results that seem harsh; but, however regrettable may be the necessity that sometimes requires the elimination of a vicious member of society, the fact remains that there is nowhere a satisfactory substitute for the death penalty, if we are to regard the safety of society of greater importance than sparing the lives of its foes—murderers among them.

CHAPTER II.

Drastic Codes Justified

THE latest edition of the **Encyclopedia Britannica** (this is written in 1914) has collected and summarized the current arguments against capital-punishment. From that presentation it appears that the following reasons have been advanced: (1) On the ground that we may not rob the sinner of due time for repentance; (2) because all murderers are insane; (3) because capital-punishment does not deter others from committing crimes of similar iniquity, this by reason of the infrequency of its being carried out, and because the murderer takes the chance that he will escape; 4) because of the danger of hanging the innocent; (5) because it does not reform the offender.

The following arguments are usually presented to combat this view: First, that the state has nothing to do with theological questions concerning repentance, also that the view advanced in argument number one is based on antiquated conceptions of eternal punishment, compensation, and the moral law.

In opposition to the contention that all murderers are insane, it is maintained that this theory is in absolute variance with the facts, unless we accept the fanciful view that every man whose conduct varies in the least from the ideal is insane. Lombroso's thesis concerning criminal degeneracy and the irresponsibility of the wicked has been refuted as a whole, although there is some truth in the general theory.

In answer to the contention that capital-punishment does not deter others from committing crime, it is said that there is little if any value in this class of negative statistics, as pointed out by Herbert Spencer, and as all logicians agree. In further opposition, the case of the United Kingdom, with its swift and certain punishment of murderers, is cited as a marked example of the deterrent influence of capital-punishment. It is also said that capital-punishment was speedily restored in France, in many Swiss cantons, in Germany, Colorado, Iowa, and some of the states of Italy, because of the rapid increase of brutal murders after its abolition.

With regard to hanging the innocent, it is maintained that society cannot afford to pursue a policy of lenity toward murderers simply because an innocent man may now and then be hanged. As between the life of an innocent man, caught in the web of circumstances, and the lives of hundreds of innocent men that may be taken (under a policy of mistaken lenity, by reason of the unrestrained brutality of murderers), we must choose the lesser evil, which may even result in the sacrifice of the one innocent man.

Furthermore, it is proposed to limit capital-punishment to cases where the evidence is overwhelming and where the crime is one of undoubted brutality, free from the element of impulse, as in a sudden quarrel. In impulsive cases, life imprisonment would be substituted.

HANGING AND REFORM.

In answer to the contention that hanging does not reform the offender, it is said that it comes closer to making a reformation than anything ever discovered,

on the theory that "a dead Indian is a good Indian." There are those who contend that the majority are reformed just before they die. The business of the state is not to reform murderers, but to protect society. It is urged that society cannot take the risk of associating with a murderer who has burned his neighbor at the stake, poisoned his father for an old suit of clothes, or beaten his mother to death for the life insurance, simply because some devotee of the law of love, so-called, has given his opinion that the murderer is now sorry, and that he desires to become a nurse for children, or a watchman in a bank.

It is further shown that two-thirds of all criminals are recidivists—confirmed offenders or men confined again and again for their misdeeds—with whom society can afford to take no further risks. It is also shown that the criminal is beyond the influence of reform, on the one hand, and that his prison life makes him more anti-social than he was, on the other. Henry Maudsley shows, in *Body and Mind*, that neither kindness nor severity prevents certain criminal types from devising and doing wrong. They are beyond the law of love. See, also, McConnell's *Criminal Responsibility*, page 80.

Herbert Spencer shows, in his essay on *Prison Ethics*, that "it is notorious that prolonged denial of human intercourse produces insanity and imbecility; and on those who remain sane, its depressing influence must almost of necessity entail serious debility, bodily and mental."

IMPRISONMENT BECOMES INHUMAN.

Spencer shows that at Dartmoor and Pentonville the prisoners have downcast looks. Their brains are so

affected that they cannot give replies to the simplest questions, for imprisonment makes them anti-social by fostering self-regarding desires. It makes even well-disposed men unfit for future association. While silence and solitude may cow the spirit and undermine the energies, they cannot reform the prisoner. Page 162, Vol. III, Spencer's **Scientific Essays**.

ANOTHER ENCYCLOPEDIA QUOTED.

Under the title **Capital-Punishment**, the **Encyclopedia Americana** sets forth the general position enunciated in the **Britannica**, the **Standard**, and other encyclopedias. Its presentation is worth consideration and is, briefly, as follows:

The right to administer capital-punishment has been doubted by some distinguished persons; and the doubt is often the accompaniment of a highly cultivated mind, inclined to the indulgence of romantic sensibility, believing in human perfectibility; but the right of society to punish offenses against its safety and good order will scarcely be doubted by any considerate person.

In a state of nature, individuals have a right to guard themselves from injury, and to repel aggressions by a force or precaution adequate to the object. This results from the right of self-preservation. When men enter society, the right to protect themselves from injury and redress wrongs is transferred generally from the individual to the community. When the right of society is once admitted to punish for offenses, it seems difficult to assign any limits to the exercise of that right, short of what the exigencies of society require. If a state has a right to protect itself and its citizens in the enjoyment of its privileges and

its peace, it must have a right to apply means adequate to this object. If mild punishments fail to effect, more severe ones must be resorted to, if the offense be such as affects society in its vital principles, or safety, or interests. The very frequency of a crime must often furnish a very strong ground for severe punishment.

LIFE A GIFT OF GOD.

It is often said that life is the gift of God, and therefore it cannot be justly taken away, either by the party himself, or another. The fallacy of this argument is obvious. Life is no more the gift of God than are any other personal endowments or rights. A man has, by the gift of God, a right to personal liberty and locomotion, as well as to life; to eat and drink and breathe at large, as well as to exist, yet no one doubts that he may be perpetually imprisoned, or deprived of free air, or compelled to live on bread and water. In short, no one doubts that he may be restrained in the exercise of any privileges or natural rights short of taking his life. Yet the reasoning, if worth anything, extends to all these cases in an equal degree. If, by his crimes, a man may justly forfeit his personal rights, why not his life? No reasonable man doubts the right of a nation, in a just war, especially of self-defense, to repel force by force, and take away the lives of its enemies. In these cases life is freely sacrificed by the nation. If so, why may not life be taken away by way of punishment, if the safety of society justifies it?

After summarizing some of the sentimental arguments against the death penalty, volume I of the **Americana Supplement** says: "Plausible as these and

other arguments of a similar nature may be, the undoubted fact remains that when the death penalty was abolished in France the number of brutal murders increased so rapidly that it was necessary to put the penalty again in operation, which was done in 1909."

In the same article, Dr. George F. Shrady, Jr., of New York, says: "The average murderer has less fear of life imprisonment than of the electric chair. If capital-punishment were abolished homicides would be on the increase."

All modern encyclopedias, as well as the old ones, justify the doctrine of capital-punishment for the more brutal crimes that occur in the realm of murder unrestrained. Now it stands to reason that these great reference works would set forth in detail any substitute that had proved satisfactory. These volumes cite instances of the repeal and subsequent restoration of the capital-punishment law here and there, and of the infrequency of its use in certain states and provinces. They also note the growing agitation against it in many American states, but none of them indicate that any new theory of penology has solved the problem satisfactorily, either with or without the gallows, in spite of the glib claim of many agitators that the death penalty has broken down, and that civilized states now look upon the gallows as obsolete. The United Kingdom, France, and Germany are carefully excepted from these sweeping statements. See McConnell's *Criminal Responsibility*, page 335.

HARSHNESS BECOMES A DUTY.

The harshest penal system is ethically justified, if it is as good as the circumstances of the time permit. Though we are not a low and barbarous people, we

have a dangerous class of cold-blooded murderers among us, also sentimental theories, the adoption of which would make all punishment a farce.

Let us examine the general question of punishment through the spectacles of Herbert Spencer, the great English philosopher, and founder of the synthetic system of philosophy. He has gone to the foundations of learning and given us great wisdom. He traces every theory of ethics to its fundamental source, and shows the validity of the gallows, if that be expedient for the safety of society.

Punishment exists in nature, and offenders have to bear the evils following the transgression of law. The careless man falls and is bruised or suffers broken bones. The glutton suffers from visceral derangements, and he who transgresses the conditions of social welfare cannot justly escape the scourge of the law. Even the harshest penal system is justified if the circumstances of the time demand its restraining power.

IMPOSSIBLE ETHICAL LAWS.

If one holds before society an impossible ethical law, a code so angelic that its enforcement substitutes the law of love, so-called, for the law of force, he at once unlocks every prison-door, discharges every sheriff, and abandons courts and administrative offices that have to do with the apprehension and punishment of transgressors. He disbands every army, sinks every battleship, and abandons every personal and public means of enforcing rights of property. If we are to meet the invasion of private and public rights—the armed foe in form of a destroying army, as well as the armed foe with mask and bludgeon—by submissive non-resistance, we perpetrate wrong by permitting the

world to fall under the domination of murderers and thieves.

On page 118 of **Social Statics**, Herbert Spencer shows that "the consistent advocates of the doctrine of non-resistance must not only allow themselves to be cheated, assaulted, robbed, wounded without offering active opposition, but must refuse help from the civil power; seeing that they who employ force by proxy are as much responsible for it as if they employed it themselves."

Tolstoy, the greatest modern disciple of the theory of non-resistance, says the law must be literally observed, as is shown later in this discussion. Under his view governments and churches must be abandoned.

Continuing this phase of the discussion, Spencer says: "Such a theory makes pacific relationship between men and nations look needlessly utopian. If all agree not to aggress, they must as certainly be at peace with each other as though they had all agreed not to resist. So that, while it sets up so difficult a standard of behavior, the rule of non-resistance is not one whit more efficient as a preventive of war than the rule of non-aggression."

Moreover, this principle of non-resistance is not deducible from the moral law. The moral law says—**Do not aggress**. It can not say—**Do not resist**; for to say this would be to presuppose its own pretexts broken. Morality describes the conduct of perfect men; and can not include in its premises circumstances that arise from imperfection. That rule which attains to universal sway when all men are what they ought to be, must be the right rule, must it not? And that rule which then becomes impossible of fulfillment must be the wrong one? Well, in an ideal state the law of non-aggression is obeyed by all—is the vital principle of every one's conduct—is fully carried out, reigns,

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lives; whereas in such a state the law of non-resistance necessarily becomes a dead letter.

NON-RESISTANCE IS WRONG.

Here follows the conclusive bar to the impracticable theories of those who would treat the murderers of this imperfect world as if they were the erring angels of a blighted environment, rather than the wicked criminals of a very real and a very selfish world. Spencer thus concludes:

Lastly, it can be shown that non-resistance is absolutely wrong. We may not carelessly abandon our dues. We may not give away our birthright for the sake of peace. If it be a duty to respect other men's claims, so also is it a duty to maintain our own. That which is sacred to their persons is sacred in ours also. Have we not a faculty which makes us feel and assert our title to freedom of action, at the same time that, by a reflex process, it enables us to appreciate the like title in our fellows? Did we not find that this faculty can act strongly on behalf of others, only when it acts strongly on our own behalf? And must we assume that, while its sympathetic promptings are to be diligently listened to, its direct ones are to be disregarded? No; we may not be passive under aggression. In the due maintenance of our claims is involved the practicability of our duties.

In other words, dogged resistance to aggression is the instinct of freedom. It was that impulse that gave us Magna Charta, the Declaration of Independence, and, back of these, the ancient wars that won for civilization its ascendancy over the Persians, the Huns, and other barbaric and aggressive foes. Unscrupulous and liberty-destroying tyranny has never been throttled by the doctrine of passive measures and non-resistance; but tyrants have been destroyed all the way from Thermopylae to Bunker Hill, and from Bunker Hill to the hanging of the latest murderer under the reign of law.

It is worth noting that the doctrine of non-resistance, under literal interpretation, was for a time enforced by the early Christians. Any trustworthy history of Christianity will show how hopelessly the experiment failed, and Christianity overspread the globe under a more practical and aggressive interpretation.

SUPER-HUMAN CODES RIDICULOUS.

An ultra-mundane and super-human code of ethics is not practicable in the world we know. Tolstoy, the latest of the great exponents of the doctrine of non-resistance, opposes just wars, opposes all forms of government, and all resistance against aggression. He repudiates Exodus xxi and xxiv and emphasizes this sentiment: "But whosoever smiteth thee on thy right cheek, turn to him the other, also. And if any man would go to law with thee, and take away thy coat, let him have thy cloak also."

He commends Leviticus xix, 17, 18, and emphasizes the literal obligation implied in the commandment, "Love your enemies and pray for them that persecute you." He subscribes to the doctrine of old Ferrucius, who said: "Christians are not allowed to shed blood, even in a just war, at the command of Christian emperors."

He cites with regret the fact that the Montanists and Manichaeans were ridiculed for views like those of Ferrucius. In this connection, it is worth while to reflect that the followers of Manes, Mani, or Manichaes, who lived in the fourth and fifth centuries of the Christian Era, condemned marriage, sexual indulgence, and the use of animal food as well. See Vol. 85 of the **Fortnightly Review** for his articles on the Law of Love versus the Law of Force, pages 461 and 689.

There can be no half-way interpretation of the law of love, according to Tolstoy and others who abide by the ancient and long abandoned interpretation of the Scriptures. As before said, the early Christians forsook their sublimated views early in the struggle of the Church to redeem the world.

TOLSTOY'S DOCTRINES EXTREME.

Tolstoy cannot be quoted and followed piecemeal. Those who would abide by his doctrine of non-resistance must follow it to its logical conclusions, as he tried, pitifully, to do. They must forsake civilized ideals, dwell-like peasants, and renounce government. Above all, they must abandon wealth and pleasure for the ascetic life. The logical result of the doctrine that commands us to turn one cheek to the aggressor after the other has been slapped is epitomized in the picture of the Lowly Nazarene. It was the propounder of that doctrine who had not where to lay his head. Even worse poverty than that condition portrays would be the result of a similar course of living among the criminals of this sordid age.

Not only does Tolstoy denounce the church and modern Christianity for their failure to follow the Sermon on the Mount in its literal meaning, but he shows that the Taoists, Buddhists, and the pre-Christian religions of deep antiquity taught the law of love as a great virtue, though not as the supreme blessedness, as he interprets Christ's teachings.

He makes no exceptions whatever to the literal strictness of Matthew v, 21, 39, and 40, but gives the law of love an exact, literal, and definite meaning—the superlative, unalterable law of life. This law is so strict that, he says, it rejects the whole world—

organization of government and church, founded, as he maintains, on violence. He specifically emphasizes the fact that any kind of exception to the literal interpretation destroys the entire meaning of the law of love. Are the modern advocates of that law ready to follow the Tolstoyan conception of duty? Otherwise their abolition of the gallows is a mere makeshift.

EARLY CHRISTIAN MILDNESS.

The early Christians (up to the fifth century) maintained a Tolstoyan abnegation. Many went to the gallows or the stake rather than participate in wars. Tatian, Athenagoras, the great Origen, Tertullian, and Lactantius opposed war and every other kind of destruction of human life. Maximilian, Marcellus, and Cassian were hanged for refusing to join the army. They contended that, being Christians, it was unconscionable to fight. But by the year 416, A. D., pagans were banished from the Roman armies, **and all Roman soldiers were Christians.** Witness also the Crusades, which were military expeditions sent out by the Christians of the West, between the eleventh and the thirteenth centuries, for the purpose of capturing Palestine from the Mohammedans. See Tolstoy's articles in the **Fortnightly Review**, Vol. 85, pages 461 and 689.

Spencer elucidates his views in **The Data of Ethics**, a masterful little volume that is worthy of careful study. The learned author's candid examination of sundry ethical theories is clarifying. Whether one traces the validity of moral injunctions to an authority believed to be of sacred origin, or whether he deems a secular basis sufficient, he must recognize the need of a regulative system for human conduct.

It is shown that religious creeds all embody the

belief that right and wrong are right and wrong simply in virtue of divine enactment. See *Data*, page 50.

Plato and Aristotle make state enactments the sources of right and wrong. Hobbes and a few modern thinkers subscribe to the ancient view that rights are wholly the results of convention, but this view is for the most part now regarded as untenable and inconsistent. Page 52. The better conception, however, is that the authority of law is derivative, not original, derived from necessity.

Then we come to the intuitionist school, who believe men have been divinely endowed with moral faculties. Spencer maintains, in opposition to this view, that all supposed faculties have resulted from inherited modifications caused by accumulated racial experiences. Page 55. The rightness or wrongness of acts must finally be determined by the goodness or badness of the effects which flow from them.

The utilitarian theory of ethics, which estimates conduct by observation of results, is a part recognition of the causation theory. Mr. Spencer contends that all current theories fail to give proper credit to causal connections. They overlook the necessary relations between causes and effects. Page 61.

He then comes to the conclusion that the life of the social organism must ever rank above the lives of its units. As fast as a social state establishes itself, the preservation of the society becomes a means of preserving its units. Social self-preservation becomes a proximate aim, taking precedence of the ultimate aim, individual self-preservation. Page 134. Inadequately punished trespasses rouse antagonisms, and if these are numerous the group (society) loses coherence. Page 138.

Spencer recognizes the fact that there is truth in the **a priori** deductions of the followers of abstract ethical codes, but he shows that the fault of these speculators is that they do not recognize **human nature as it is**—the **a posteriori** conditions of life. For the due guidance of conduct there must be due recognition of the functions of the two conceptions.

ABSTRACT ETHICAL STANDARDS.

There is an **absolute** standard of rectitude; but with men as they are and society as it is, the dictates of absolute morality are not practical. Legal control involves infliction of pain on those restrained or punished and on those who pay the cost, and as absolute morality is the regulation of conduct so that no pain shall be inflicted, it might be argued that all legal control is wrong, which would lead us into absurdities. Since legal control is indispensable, we cannot escape from guiding ourselves by the rules of relative morality.

Soft conduct on the part of offenders will beget a softer code. If you would abolish the gallows, abolish murder.

In violent reaction against the harshness of punishment as carried on in the past, it is manifest that the anti-capital-punishment advocates are insisting on a painless punishment wherein the lack of discipline becomes the fondling of a love that is neither understood nor appreciated by the criminal mind, nor does it do aught but mischief to society as a whole. The misconduct of criminals in society as it is now constituted cannot be cured, nor can the misconduct of other criminals be prevented by upholding standards fit only for angels—standards of abnegation beyond

human achievement. The effect of such a course is to produce a despairing abandonment of all attempts at a higher life. By association with rules that cannot be obeyed, rules that can be obeyed lose their authority.

For a corroboration of these deductions, see Preface to the **Data of Ethics**.

Those who would deal softly with murderers of the worst type, put before them a standard of human perfectibility that is unwarranted. They portray human nature as it might exist in an ideal state, failing to deal with man as he is, and with criminals as they are. While the ideal man is the standard of absolute morality, which deals only with perfect conduct, he is not the creature with whom criminal codes discharge their functions. See chapter on **Absolute and Relative Ethics**, in **Data of Ethics**.

The co-existence of a perfect man in an imperfect society is impossible. As well expect a blue-eyed, red-headed fruitarian to be born of a black cannibal mother as to look for the man of ideal character among the murderers apprehended from the ranks of men having natures remote from the ideal. The gallows, though in opposition to the teachings of an impossible and highly abstract ethical conception, is preferable to a carnival of murder. We come back to the Spenserian dictum that if extreme penalties are necessary to the safety of society, and if without them there would be an increase of crime, **the extreme penalties are not contrary to morals**. In other words, **that which produces the least wrong must be relatively right**. The gallows being thus justified on ethical grounds, its continuance becomes, not a matter of abstract morality, but a question of expediency.

The following quotations from Spencer's discussions should be carefully studied by those desiring a rational basis for their advocacy of a theory of government directly the opposite of misapplied doctrines of non-resistance. On page 280 of **The Data of Ethics** Spencer puts the case thus:

WHY IDEAL CONDUCT FAILS.

Ideal conduct such as ethical theory is concerned with, is not possible for the ideal man in the midst of men otherwise constituted. An absolutely just or perfectly sympathetic person could not live and act according to his nature in a tribe of cannibals. Among people who are treacherous and utterly without scruple, entire truthfulness and openness must bring ruin. If all around recognize only the law of the strongest, one whose nature will not allow him to inflict pain on others, must go to the wall.

From Herbert Spencer's **Essays, Scientific, Political, and Speculative**, Vol. III, page 152, title **Prison Ethics**:

The two antagonist theories of morals, like many other antagonist theories, are both right and both wrong. The *a priori* school has its truth; the *a posteriori* school has its truth; and for the proper guidance of conduct, there must be due recognition of both. On the one hand, it is asserted that there is an absolute standard of rectitude; and respecting certain classes of actions, it is rightly so asserted. From the fundamental laws of life and the conditions of social existence, are deducible certain imperative limitations to individual action—limitations which are essential to a perfect life, individual and social; or, in other words, essential to the greatest happiness. And these limitations, following inevitably as they do from undeniable first principles, deep as the nature of life itself, constitute what we may distinguish as absolute morality.

On the other hand it is contended, and in a sense rightly contended, that with men as they are and society as it is, the dictates of absolute morality are impracticable. Legal control, which involves infliction of pain, alike on

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those who are restrained and on those who pay the cost of restraining them, is proved by this fact to be not absolutely moral; seeing that absolute morality is the regulation of conduct in such way that pain shall not be inflicted. Wherefore, if it be admitted that legal control is at present indispensable, it must be admitted that these *a priori* rules can not be immediately carried out. And hence it follows that we must adapt our laws and actions to the existing character of mankind—that we must estimate the good or evil resulting from this or that arrangement, and so reach, *a posteriori*, a code fitted for the time being. In short, we must fall back on expediency.

TWO SIDES TO BE VIEWED.

Now, each of these positions being valid, it is a grave mistake to adopt either to the exclusion of the other. They should be respectively appealed to for mutual qualification. Progressing civilization, which is of necessity a succession of compromises between old and new, requires a perpetual readjustment of the compromise between the ideal and the practicable in social arrangements: to which end both elements of the compromise must be kept in view.

If it is true that pure rectitude prescribes a system of things too good for men as they are; it is not less true that mere expediency does not of itself tend to establish a system of things any better than that which exists. While absolute morality owes to expediency the checks which prevent it from rushing into utopian absurdities, expediency is indebted to absolute morality for all stimulus to improvement.

Granted that we are chiefly interested in ascertaining what is relatively right; it still follows that we must first consider what is absolutely right, since the one conception presupposes the other. That is to say, though we must ever aim to do what is best for the present time, yet we must bear in mind what is abstractly best so that the changes we make may be towards it, and not away from it.

Page 158: To restrain (some offenders) there must be penalties which are severe, prompt, and specific enough to

be vividly conceived; while others (in a higher state of civilization) may be deterred by penalties which are less definite, less intense, less immediate. For the more civilized, dread of a long, monotonous criminal discipline may suffice; but for the less civilized there must be the infliction of bodily pain and death. Thus we hold, not only that a social system which generates a harsh form of government, also generates harsh retribution; but also, that in such social conditions, harsh retributions are requisite. And there are facts which illustrate this. Witness the case of one of the Italian states, in which the punishment of death having been abolished in conformity with the wish of a dying duchess, assassinations increased so greatly that it became needful to re-establish it.

Besides the fact that in the less advanced stages of civilization, a bloody penal code is both a natural product of the time and a needful restraint for the time, there must be noted the fact that a more equitable and humane code could not be carried out from want of fit administration. To deal with delinquents not by short and sharp methods but by such methods as abstract justice indicates, implies a class of agencies too complicated to exist in a low society, and a class of officers more trustworthy than can be found among its citizens. Especially would the equitable treatment of criminals be impracticable where the amount of crime was very great. The number to be dealt with would be unmanageable. Some simpler method of purging the community of its worst members becomes, under such circumstances, a necessity.

The inapplicability of an absolutely just system of penal discipline to a barbarous or a semi-barbarous people, is thus, we think, as manifest as is the inapplicability of an absolutely just form of government to them. And in the same manner that, for some nations, a despotism is warranted, so may a criminal code of the extremest severity be warranted.

Page 159: "However inequitable in the abstract were the beheadings, crucifyings, and burnings of ruder ages, yet, if it be shown that, without penalties thus extreme, the safety of society could not have been insured—if, in their

absence, the increase of crime would have inflicted a larger total of evil, and that, too, on peaceable members of the community; then it follows that morality warranted this severity. In the one case, as in the other, we must say that, measured by the quantities of pain respectively inflicted and avoided, the course pursued was the least wrong; and to say that it was the least wrong is to say that it was relatively right.

ABOUT ULTIMATE AIMS.

Page 165: If life is our legitimate aim—if absolute morality means, as it does, conformity to the laws of complete life; then absolute morality warrants the restraint of those who force their fellow-citizens into non-conformity. Our justification is, that life is impossible save under certain conditions; that it can not be entire unless these conditions are maintained unbroken; and that if it is right for us to live completely, it is right for us to remove any one who either breaks these conditions in our persons or constrains us to break them. Such being the basis of our right to coerce the criminal, what is the legitimate extent of the coercion? Only what is necessary to suppress crime.

Page 169: Spencer here says it is the business of society to defend itself against the prisoner. If he has to work hard and fare scantily, these evils must be counted among the penalties of his transgression—the natural reactions of his wrong.

THE TREATMENT OF CRIMINALS.

Coming to the application of this law to the treatment of criminals, the great synthetic philosopher announces that the same average popular character which necessitates a rigorous form of government, necessitates also a rigorous criminal code. Institutions are ultimately determined by the natures of the citizens living under them. When citizens are impulsive and unscrupulous they will need severe forms of punish-

ment. The character which originates and sustains political liberty, is a character not at the mercy of immediate temptations, but one which contemplates the consequences of the future. On the other hand, men who dwell only in the present, the special, the concrete, will put little value on those rights of citizenship which profit them nothing.

The mercenary murderer, the hired assassin, is a concentrated example of the man who lives in the concrete, the present, the special—who lives for sordid and wicked selfishness only—and lives in this wickedness even to the extent of slaughtering the innocent in the most cruel and inhuman manner for a mess of pottage. No new notions of brotherly love and reformation are applicable to this class. These belong to the jurisdiction of the Destroying Angel of history.

In another way, Sir Leslie Stephen, in his remarkably comprehensive volume, **The Science of Ethics**, comes to the same conclusion. On page 413 he says: "Against some people, in short, the only effective arguments are the gallows or the prison. Unluckily they are arguments which **cannot be brought to bear with all the readiness desirable**, and therefore I think it highly probable that there will be bad men for a long time to come."

THE MURDERER'S ARGUMENT.

On the preceding page, in passing, it may be noted that he says: "The cold-hearted and groveling nature has an argument which, from its own point of view, is not only vicious in practice, but logically unanswerable. Not only is it impossible to persuade people to do right always, but there is no argument in exist-

ence, which, if exhibited to them, would always appear to be conclusive."

He cites the downright selfishness of a torpid nature that is not moved by sympathy or like considerations—a man who steals or murders because he desires to gratify his senses, regardless of the misery and starvation of others, their sorrows, and their right to live. It is against such men that the argument of the gallows is invoked by Sir Leslie, whose work is one of the ablest ever written on the science of ethics. He shows that recognition of the fact that "murderers are liable to be hanged" does not deter all men from murdering, because the recognition of the general proposition involved in the death penalty will operate differently according to a man's character. He adds: "If it is a general recognition, involving a realization of all the facts implied, it is but the logical aspect of an emotional process, which is symbolized by the words **murderers are liable to be hanged**. He must have a foretaste of the various horrors connected with hanging; and the painful foretaste of an appearance on the gallows will struggle with the pleasurable foretaste of gratified revenge, and determine his conduct. For him, the terror, the hatred, are facts; actual forces which move him one way or the other, and which are rendered possible by intellectual foresight, as it, again, is only possible through them; that is, neither of them could exist separately." Stephen, page 423.

On page 426 the learned author says that the highest penalty of the law—the death penalty—depends for efficacy on the love of life, which of course is almost universal and ever tenacious; but there may be cases in which a man ceases to care for life, and so far be beyond the power of the legislator. Again,

unless a man has certain sensibilities—which murderers have not—the moralist, the teacher of the law of love and kindness, has no leverage. If a man is without conscience you cannot move him by speaking of right and wrong. Many men are wicked; no man is perfect—and no dexterous logic will make the wicked good, nor so long as it appeals to motives which they cannot appreciate, will it convince them that it is well to be good. Stephen, page 427.

On page 438 Stephen says: "The punishment is proportioned to the offense. How is the proportion to be determined? Surely the perfection of human justice is measured by its efficiency. That system is best which most diminishes crime."

On page 441, he says: "A man will refrain from conduct if he fears to be punished, whether the punishment dreaded is to come from a real or an imaginary being. The fear of hell, so long as people believe in hell, may be a genuine restraint just as much as the fear of the gallows."

It will be seen that this is a far different rule from that which holds that the main object of penal institutions is the reformation of the criminal. Let us now go more deeply into the philosophy of punishment, analyzing every one of the theories recognized by philosophers, theologians, and others.

CHAPTER III.

The Philosophy of Punishment

AN examination of the modern arguments against capital-punishment reveals the fact that four marked attacks are made on the gallows—the first on the ground that the state has no moral right to take life, since it did not give it; the second, that capital-punishment does not deter other murderers from plying their bloody trade; the third, that the taking of a human life, even in obedience to a judicial decree, is demoralizing; the fourth, that the murderer is a victim of unjust social conditions, for which reason he should be pitied and reformed. The first two objections will presently be discussed in detail.

The third objection is purely mythical, since England and some other countries where capital-punishment is strictly enforced exhibit a more sacred regard for human life than is found in America and other lands where punishment for murder is neither swift, sure, nor drastic. The fourth objection is based on a total misconception of the functions of the state and of the philosophy underlying rewards and punishments in general, as will be shown further along.

As to the right of society to go to extremes to protect itself, as already shown, there can be no valid objection, if it be admitted, as it must be, that the lives of all the people are more sacred than the lives of the wicked minority.

The late Doctor Ray Madding McConnell, for many years instructor in social ethics, at Harvard, has given a beautiful example illustrating the fact that society may even be justified in taking the life of an innocent person, in order to save the lives of many others who are equally innocent.

Suppose the case of a city surrounded by warships. The commander demands the surrender of a man accused of being a spy. It is positively known that he was not a spy, and that to surrender him is to send him to the executioner's block; yet the city is defenseless. It is given twenty-four hours in which to surrender the suspect, the alternative being bombardment. The bombardment, beyond all question, will kill thousands of innocent men, women, and children. Will anybody say that the surrender, under such circumstances, would be an unrighteous taking of life? The surrender becomes necessary as an expedient, under the law of self-defense, and on the theory that the whole is more important than any of its parts.

Similarly, if the infliction of the law's gravest penalty in the case of a murderer deters other criminals from committing murder, the killing is justifiable. It is contended by some disputants that capital-punishment does not deter from crime. As Herbert Spencer and others have shown, there is little value in negative statistics, even if they exist. In this case, however, the statistics point positively to the opposite conclusion, as shown in cases heretofore cited. It must be admitted that nobody can go into the criminal heart and gather statistics of the number of murders that have not been committed because of the gallows. The author of this work has met many men in his time who have assured him that, but for the gallows,

they would have slain their enemies—and some of these men have been far above the ordinary criminal in moral fiber and intellectual training.

Just how far either penitentiaries or gallows may prevent crime can never be known. The country is full of penitentiaries, jails, criminal courts, policemen; and detectives. Crime continues, and even increases. Shall we therefore abandon courts and penitentiaries, policemen, and the penal code? Yes, if we heed the same kind of argument that is made against the gallows. If the gallows must be torn down because murderers still haunt the world, then penitentiaries must be destroyed because burglary and highway robbery still exist, or even increase. Who knows how many more robberies, how many more murders would occur if the gallows and the penitentiaries were abandoned?

The argument is sometimes made that capital-punishment causes an increase of murder. Has anybody ever seen a man who committed murder because he felt sure he would be hanged for the deed? If it be argued that the extension of a sentimental fad is taking the backbone out of some men, and that we have no longer enough men of determined character to enforce the just laws of the land, it is not a failure of the gallows, but a failure of manhood. It would not be a failure of the gallows, but a failure to use the gallows, that would blight the reign of law and order.

The Reverend Father John J. Ford, S. J., of the University of Saint Ignatius, San Francisco, has shown that even if it were proved that the abolition of capital-punishment had been followed by a decrease of crime, it would not follow that the decrease was because of the abolition. After this, therefore, because

of this (the invalid **post hoc, ergo propter hoc** attribution of a false cause to a result), is in opposition to the fundamental principles of logic.

Crime is diminished by precautionary measures—greater skill and vigilance of the police, better lighted streets, better moral instruction of children, and a lessening of misery and poverty, of drunkenness and debauchery. Father Ford concludes thus: "If it could be shown that the number of murders had been diminished because capital-punishment had been abolished, this would not make for the contention of the opponents. It would merely go to prove, according to strict logic, that capital-punishment, by which murder was formerly punished, was a lesser punishment than imprisonment, **with a chance of being paroled or pardoned**, and that, instead of deterring men from crime, it rather, by some mysterious allurements, the secret of which is known only to the abolitionists, incited men to crime."

It should also be borne in mind that any decrease of crime—and there has seldom been a decrease of any consequence in this country—must be traced to other causes than the penalty of life imprisonment, especially if the interval of time between the periods of comparison be long.

Several references have been made to the late Doctor McConnell's masterful work, **Criminal Responsibility and Social Constraint**. It is generally regarded as a classic on the subject it essays. It is a brilliant analysis of the entire subject of crime and its punishment. Every discussion is presented with the utmost point and explicitness. A work so admirably articulated, so comprehensive in its presentation of every aspect of the question, should be better

known to the general public. The treatment is philosophic and practical in every particular. The learned author discusses the aim of punishment, freedom in crime, and responsibility for crime. He is particularly helpful in discussing the general purpose of punishment. He considers in turn each of the many theories, by first stating the theory and the grounds on which it is based, then the objections to it. The reader thus has at the outset the point of view commonly presented by the lawyer, the sociologist, the moralist, the priest, the physician, the eugenicist, the policeman, the soldier, and even of the criminal himself.

Expiation, retribution, deterrence, reformation, social utility, freedom in crime, and responsibility for crime are next so presented that the work becomes a treatise on the philosophy of punishment, for it discusses the psychology of will, motive, and choice—the nature of causation, with particular freshness and masterful grasp. It also epitomizes the literature of the general subject.

OBJECTS OF PUNISHMENT IN DETAIL.

At the conclusion of his analysis the reader feels that an X-Ray has been turned upon the subject. The author concludes that there is a difference between social and metaphysical accountability in crime, and he regards repression (deterministically), and even the gallows, necessary to prevent crime.

It becomes interesting to ask, at the outset, What is the object of punishment in general? It is shown that the handling of crime in the United States costs almost as much as to maintain the public schools. It exceeds the cost of conserving health, maintaining highways, parks, and playgrounds. The thoughtful man won-

ders, sometimes, what return society gets from this enormous investment. How far it suppresses crime, protects society, or reforms the evil-doer, is always a mystery. Here are the answers commonly given to the question, What is the object of punishment?

1. The lawyer says punishment is to compensate for damage and prevent further damage to society.

2. Sociologists say punishment is to restore the social equilibrium and prevent future disturbances.

3. Modern psychologists say punishment works on the memory of the criminal and of others who hear of the punishment and are thereby deterred from committing similar crimes.

4. Moralists would rouse the culprit to remorse, repentance, and subsequent reformation.

5. The priest says punishment is to expiate for sin, to make atonement to God, the moral governor of the universe, through the suffering of the wicked offender.

6. Physicians say punishment is to eradicate plague spots from the criminal's mind, also to prevent a spreading of the plague in such a way as to infect society.

7. The eugenist believes punishment is a means of purifying the race and creating the best social type. He would extirpate the units that have degenerated.

8. Policemen say punishment is to frighten the offender and instill fear in the minds of others inclined to criminal deeds—practically the legal and deterrent view.

It will be noted at the outset that there seems no general agreement as to whether punishment should be **retrospective** or **prospective**, whether to requite for an evil past or mold a better future. Doctors of the civil law differ as to the purpose of their prescriptions.

Sundry differences also exist in the ranks of all classes of thinkers who have tried to solve this persisting problem. These differences are largely because punishment is an instrument that has been developing for thousands of years, an instrument that is destined to undergo vital changes with the changes of civilization and the passing away of old economic systems, for Emerson was right in saying that crime and punishment grow from the same stem.

Punishment is an instrument of infinitely complex growth. In spite of the differences that divide thinkers who try to formulate systems of penology, it will be seen that all variations in the objects of punishment come under four great types—expiation, retribution, deterrence, and reformation. This is particularly true of the older views. Punishment for social utility, however, embraces some of the elements of the four objects, adding another.

Though there is an element of truth in almost every theory, it seems impossible to restrict punishment to any one definite aim. Its purpose is complex, the central object being for social utility. McConnell says (page 114):

Punishment is given for social defence, for social protection, for social security, for the prevention of disturbance in the economic, political and general social order, for the realization of the social ideal, for the promotion of the general well-being, for the attainment of the greatest happiness of the greatest number.

It will be noticed that all of these relinquish the idea of concern with the individual *per se*. Punishment does not function as a spiritual guide for the individual. Its object is not moral or religious goodness. It is not concerned with individual personal virtue. Its notion is wholly social. It is justified on account of its utility, its necessity for the intercourse of men. It is given because essential to the preservation of organized society. If crime were not subjected to corrective discipline in a regular and orderly way by the collective authority, society would soon

become disorganized. Punishment is necessary in order to enable people to carry on business peaceably, to live in security, and to enjoy life. The system of social rights and obligations can be maintained only through afflictive penalties. The criminal violates the conditions of the general well-being; and in so far as he injures the common good, he forfeits his rights at the hands of the public. His punishment is justified by its social necessity. Thus society resembles a mutual assurance association, in which the members unite their strength against a common danger, and insure each other against harm. It must eliminate what is prejudicial to its existence. The degree of the dangerousness of the criminal is the consideration by which society should be guided in determining the corrective treatment for him. Punishment, therefore, has no meaning except as intended to secure the greater and more perfect organization of society. * * So far as social protection is concerned, expiation may be a matter of indifference. Let injuries to the gods be the concern of the gods.

AS TO SOCIAL ACCOUNTABILITY.

In answer to the theory that criminals are not socially accountable, it is contended that the essential and sufficient condition of accountability is that **the criminal act emanates from the person himself**—a caused cause, under the doctrine of fate, determinism, heredity, and environment as determining factors that destroy free will, **yet nevertheless a cause**. Thus social accountability, individual responsibility, is based on **personal authorship** of crime, and not on the idea of freedom of the will. This freedom of the will notion, holding the universe responsible and excusing the criminal, is so obscure and so variously understood by different people, that it is **incapable of service in penology**. No one is at all sure where freedom begins and determinism (fate) leaves off. I know that when I accomplish something because it is in line with my desires, habits, appetites, ideas, **it is I who do it**. For this I am responsible to society. See McConnell, page 321, for more complete discussion.

McConnell continues, in part as follows: "The reason for holding a man socially responsible for injuries inflicted by him is not that he could have refrained and ought to have refrained from them. We know that every act of his was inevitably necessitated and could not have been different. The real ground for social constraint is that of social utility. Any being whatever whose acts are injurious to society is made to answer for them, is dealt with in whatever way promises to be most appropriate for the protection of society in the future. Such treatment is not strictly punishment, but it is simply social therapeutics and hygiene. It needs no other justification than this. Most assuredly, the legal treatment of crime can not be justified on the basis of 'moral responsibility and freedom of will'; for such freedom and responsibility do not exist. It can be justified, and is justified, solely on grounds of social utility. In punishing the criminal, society is taking precautions in self-defence. Whether a damage-doer is endowed with free will or not, it is just for him to be punished so far as is necessary for social protection, as it is just for a wild beast to be put to death (without unnecessary suffering) for the same purpose."

On page 334 the learned author says: "Scientific procedure will be adjusted to the peculiar character of the individual criminal. In the application of punishment attention will be paid to modifying it according to the mental and physical condition of the patient. * * The reformable will be reformed; while the incorrigible and incurable will be held fast the remainder of their days. * * The wild beast of a man will be kept in prison for life or put to death."

On page 121 McConnell says: "Elimination, either absolute or relative, may be justified in the case of incorrigible criminals." Of course, absolute elimination is a euphemistic phrase meaning the death penalty.

A brief account of the usually advocated objects of punishment is not out of place, for it will tend to clarify the entire subject of penology:

The punitive advocates of the theory of expiation regard punishment as the expiation of a moral wrong or a religious sin. Their theory is that the crime has injured the moral order, hence it must be chastised in the person of the criminal, since punishment is a rectification of that moral order which crime has broken. Punishment is inflicted, not from bitter vindictiveness,

but as representing that which is the very foundation of the moral universe. The public must feel that guilt is an evil which reacts on the guilty who have offended the righteous universal will. There is a necessary relation between guilt and pain. Crime is an offense against God, who demands chastisement of the offender, the moral leper. God can not, in his absolute wisdom and justice, allow a guilty sinner to escape, else his authority would crumble. If the Moral Governor of the universe should permit wrong to go unpunished, then the whole moral universe would crumble to pieces and the world would become the abode of demons. Human laws must be based on the divine law, which makes the guilty suffer, since human laws are only a replica of divine injunctions.

The objections to this theory are that punishment, under human codes, can not be meted out as God's justice, because the man-made codes can not punish for immoral or irreligious deeds, for dark and criminal thoughts, but only for overt acts that break the social harmony. Human laws have to do with anti-social deeds only. Expiation looks to the past, whereas human penal codes must look to the future. In other words, thieves would not be lodged in penitentiaries if such lodgments did not deter others from theft. Society can not inflict punishment for intentions, only for overt acts, coupled with criminal intent.

RETRIBUTIVE JUSTICE ANALYZED.

The retributive justice conception of punishment demands that a person who commits crime shall be made to suffer, whether his suffering subserves any other end than suffering, or not. In other words, it would inflict punishment for the sake of punishment. If this

be not the motive, then some crimes would escape punishment. If a man should commit a fiendish murder in a South Sea Colony that was about to disband, for example, and if each member were to go to his own country, the deterrent argument would not be applicable, since there would be no one left on the island to be deterred. The murderer, having become paralyzed, can not commit any further murder. He is incorrigible and feels no compunction for his crime, so all thought of reformation is ridiculous. If this man is to be punished at all, since the usual motives are excluded in the supposititious case, it must be on grounds of retribution. Punishment of this man would satisfy the natural resentment of the community. If the public can not express its indignation in this case, a strong and justifiable emotion—the demand for retributive justice—will be suppressed, and society will feel that it has been outraged.

Under the retributive idea, punishment is an expression of righteous public indignation. It gratifies a strong general desire for retaliation. Pain must follow wrong-doing as an expression of social resentment, a sentiment so universal and natural among all men that retributive justice must be founded in right. Retribution is an instinct of all animal life. Strike an animal or a man, and retaliation naturally follows. The animal bites back, the man retorts blow for blow. Vengeance is thus a biological necessity, the basis of the survival of the individual and the species. He who strikes another may expect, by natural and social laws, to be struck in return. It is the sense of retributive justice that rejoices when the burglar is imprisoned, that extends the hand of sympathy when an innocent man suffers. Judgments either too light or too severe

outrage our sense of retributive justice. In other words, retributive justice demands that the punishment fit the crime. Scott puts the thought thus: "But each word against his honor spoke, demands of me avenging stroke."

The objections to this theory are that revenge is unworthy of society or the person punishing the offender. The criminal, say these advocates, is diseased. He needs a hospital rather than a prison. The developed moral consciousness can not inflict pain, even on a criminal. Must society lie to the liar, deceive the deceiver, and betray the traitor? Vindictiveness and retribution exceed the demands of justice. Bad acts call for good in return. Revenge is not a proper principle in social action. One evil can not cure another. "Punishment degrades those who inflict it to the level of the culprit, for punishment is only a brutal and passionate reaction." The criminal merits pity, not cruelty or severity. He is not a free agent. He is a product of abnormal biological conditions and adverse social circumstances. He is a victim of environment. Criminals and wild human beasts should be treated with pity and indulgence. Retribution punishes for the past, but society's only warrant and regard are for the future. Severity only fans the fire of criminal mania.

It will be seen that this is a sublimated view, based on the theory of human perfectibility, as if men were angelic and the law of non-resistance were universal, because of universal goodness.

DETERRENCE AS AN OBJECT.

Deterrence as a principal object of punishment has long played an important part in the philosophy of

the law of every country. Under this conception, punishment is inflicted, not because wrong has been done, but in order that wrong may not be done. As an old Californian alcalde (judge) once said, "We hang men, not for stealing horses, but that horses be not stolen." In other words, deterrence means fear, intimidation, the preventing of others than the criminal from sharing his fate, as well as giving the offender a lesson that may prevent future offenses by him. Though the number of criminals susceptible of reform is less than a third of those convicted, it is said that deterrence has some value, even in the case of the offender himself. It is well known that the fear of punishment holds many men within the letter of the law. Under deterrence, punishment is prospective rather than retrospective—just the opposite of retributive punishment, which demands its pound of flesh for broken obligations to society.

Many of the objections to the theory of deterrence are based on metaphysical considerations and refinements of reasoning too abstruse for more than brief mention here. If deterrence were the sole object, say the objectors to the theory, why not deliver the heaviest penalties in cases of sudden passion? For example, to keep a man from committing a crime under a fit of temper, a grave penalty should be threatened, whereas to prevent a man from slaying his mother needs less punishment, because affection will guide the conduct of the prospective offender. Again, the hardened offender, the incorrigible, would have to go free, because beyond deterrent restraint.

It is argued that deterrence has been fully tried in jails and penitentiaries, and by punishments ranging all the way from hard labor to a seat in the

electrical chair—all without avail. All these do not prevent the increase of crime. More than a quarter of a million professional criminals thrive by crime alone in the United States. Approximately a hundred thousand prisoners are in jails and penitentiaries year in and year out. These were not deterred by the punishment of others; others will not be deterred by their punishment. The states of the Union spend more than two hundred million dollars each year to maintain these prisons and the courts. There were 6,597 murders annually during the twenty year period from 1885 to 1904, in the United States alone, with only 1.3 per cent convictions, as against 95 per cent of convictions in Germany. In 1895 there were 10,500 murders in the United States. Where was deterrent influence? See **World Almanac**, 1913, page 309, and see **Strong's Social Progress**, 1906, pages 169 and 171.

It is also argued that it is wrong to make one man suffer in order to prevent another man from committing a crime, to make the one convicted man the scapegoat for the community, after the fashion of the ancient Jewish custom at the altar, where the one goat bore the sins of the people. It is wrong to punish Brown to prevent Jones from becoming a burglar. Two-thirds or more of all criminals are recidivists, so the punishment did not deter them from subsequent offenses.

It is argued in rebuttal to this contention that, but for the penitentiaries and jails, there would be far more crime than there is at present, also that statistics on the subject of the increase of crime are unreliable. It is shown that such men as the President of the Prison Association of New York (Eugene Smith, 1904) have shown the absence of reliable statistical data.

Smith, from other and less questionable indications, reached the conclusion that crime is decreasing. Strong, page 172, as above quoted.

REFORMATION A SECONDARY PURPOSE.

And now we come to the modern contention of the opponents of the gallows, who make reformation the principal object of punishment, the supreme end of society in its dealings with criminals. It is contended that the criminal is a sick man, not to be despised or treated harshly, but to be loved and molded into ways of righteousness. If we could only read his heart, suffer his limitations, realize his plight, our vindictiveness would become pity and loving kindness. Crime is caused by heredity and environment. Change the surroundings and much can be done, even with the hardened criminal. Hospitals, asylums and reformatories must take the place of modern prisons and their death-inflicting gallows and electric chairs. The only valid object of punishment is the moral regeneration of the prisoner. Criminals can be cured. Society has a debt to pay the criminal, for society has permitted conditions that made him possible.

In answer to this contention, it is maintained that the chief and only logical concern of the state, primarily, is with society, not with the individual offender. The state has no call to try to estimate the intrinsic worth of individual character. In many cases efforts at reformation go forward simultaneously with the punitive elements of imprisonment. If the aim of punishment be reformation, then the degree of reformation accomplished during the process of incarceration should measure the length and character of the imprisonment. It would be wrong to detain

the offender one moment beyond the time of his regeneration. Even the keenest judge of human nature is baffled in the presence of this problem. Nobody can tell whether repentance is genuine or complete, or whether a good man within prison walls might not become a bad man amid the temptations of the outside world. Many instances might be cited of pretended repentance that were followed by cold-blooded deeds of violence almost immediately after the rejuvenated and reformed criminals gained their freedom. Frequently the wickedest of men appear to repent. They whine and suffer in their cells, promising to become model citizens. Should a vicious murderer be set free when he appears to have suffered from remorse? It would be dangerous to give such a man his liberty.

The establishment of the principle of reformation as the main object of punishment for crime would free poisoners and garroters whose consciences were smitten, but would hold beggars, tramps and petty offenders for life, at public expense, if, forsooth, these offenders were not able to feel that their offenses were deep enough to cause a change of heart.

Another point of great weight, under this view, is that the man hopelessly beyond reform should not be punished, since the logical object of punishment is impossible. The slight offender, amenable to reform, should be made to suffer. There is no escape from the logical conclusion that desperate incorrigibility would excuse the offender from punishment.

If a prison is to be a place of instruction, gymnastics, music, theatrical performances, the teaching of trades and professions, and the final acceptance of this or that ethical theory or formal religion—in short, an educational home, admission to which is solely for the

comfort and well-being of the criminal—it is truly regrettable that entrance to it may be gained only through gates of wickedness and over roads of crime. See McConnell's *Criminal Responsibility*, page 105.

A HARVEST OF THISTLES.

But figures show that the reformation idea has reaped a harvest of thistles. It has been almost barren of effects in the case of the really criminal class. Drahm says that punishment has little or no effect. It does not reach the springs of human motives or affect the sources of responsible conduct. Parsons adds his testimony that science is showing more and more the narrowing field of reformation. (McConnell, page 106.) McKim also takes this view, as did Doctor Maudsley, in *Body and Mind*, heretofore quoted. The real will of the man can not be reformed. The Emersonian idea persists, as thus expressed: "When each comes forth from his mother's womb, the gate of gifts closes behind him. Let him value his hands and feet, he has but one pair. So he has but one future, and that is already predetermined in his lobes, and described in that little fatty face, pig-eye, and squat form. All the privilege of the world can not make poet or prince of him. In some men, digestion and sex absorb the vital force, and the stronger these are, the individual is so much weaker. The more of these drones perish, the better for the hive." Emerson's *Fate*.

The fundamental source of crime, all theories aside, lies in the personal moral character which, as Schopenhauer has shown, is original and unalterable. In such characters, deterrence through fear is possible, reformation never. The moral fiber can not be

changed. Oak trees do not bear strawberries. Nero was Nero still, even though Seneca was his teacher. Lead can not be transmuted into gold. Nietzsche, the brilliant philosopher, held that punishment is utterly unable to effect moral reformation. Consult, on this point, previous quotations from Sir Leslie Stephen. See also his **Science of Ethics**, chapter XI., page 418.

Carlyle knew the depths of human emotion and was familiar not only with the great criminals of history, but with the scoundrels of the market place, as well. He thus vigorously states the case of the degenerate:

“A scoundrel is a scoundrel; that remains forever a fact; and there exists not on the earth whitewash that can make the scoundrel a friend of this universe; he remains an enemy, if you spend your life in whitewashing him. He won't whitewash. The one method clearly is that, after a fair trial you **dissolve partnership with him**; send him, in the name of Heaven, whither he is striving all this while, and have done with him.” See Carlyle's **Essay on Modern Prisons**.

The fact that from seventy-five to eighty per cent of the convicted men of penitentiaries go back to crime—possibly more, but that proportion are re-convicted—indicates that Carlyle knew criminal human nature.

In the presence of the invalidity of each of the commonly suggested objects of punishment to satisfy the reason and withstand criticism, we are forced to accept the principle that **punishment is for social utility**, as expressed by McConnell in the previous quotations. Stephen reaches practically the same conclusion in his insistence that the welfare of the social fabric is the supreme end of punishment. On page 9 of his work he also concludes that “whether we are or are not free,

we must act as if we were free. Whether conduct be or be not determinate, we must reason about it as if it were determinate."

A man's actions are inferred from his character and circumstances, or his character is inferred from his actions. If two men act differently, there must be corresponding difference in the character or circumstances. If the doctrine of free will is inconsistent with this theory, it must be rejected. The social tissue, as Stephen designates it, must be preserved against criminals. The equilibrium of that tissue must be maintained inviolate, under the best ideals of the age. Morality is the sum of the preservative instincts of society, and those which imply a desire for the good of the society itself. (Stephen, page 208.) No process of education or reform would convert a Judas Iscariot into a Paul or a John. But the human hog, as well as the genuine man, will find his account in being on tolerable terms with the society in which he lives. (Stephen, page 408.)

It must always be borne in mind, as Spencer contends in his essay on *Prison Ethics*, that so long as the individual citizen pursues the objects of his desires without diminishing the equal freedom of any of his fellow citizens to do the like, society can not equitably interfere with him. He says:

Life depends on the maintenance of certain natural relations between actions and results. * * * In our dealings with external nature and our fellow men, there are relations of cause and effect, on the maintenance of which life depends. * * * The defrauded person is physically injured by deprivation of the wherewithal to make good the wear and tear he had undergone; and if the robbery be continually repeated, he must die. Where all men are dishonest a reflex evil results. * * * All are indirectly undermined by destruction of the motive for work, and by

the consequent poverty. Thus, to demand that there shall be no breach of the natural sequence between labor and the rewards obtained by labor, is to demand that the laws of life shall be respected.

FUNDAMENTAL PRINCIPLES.

The foregoing gives the fundamental justification of all restraint and elimination in punitive laws. The right of property is a logical corollary from certain necessary conditions of complete living. Spencer concludes that moralists and most lawyers are wrong in maintaining that rights are derived from human legislation, or from immediate expediency, as others say; **for the fundamental rights are deducible from the established connections between our acts and their results.** "As certainly as there are conditions which must be fulfilled before life can exist, so certainly are there conditions which must be fulfilled before complete life can be enjoyed by the respective members of society, and those which we call the requirements of justice simply answer to the most important of such conditions."

Spencer stoutly maintains that with the support of the prisoner the community has no more to do than before he committed the crime, as it is simply the business of society to defend itself against him, and it is his business to live as well as he can under the penalties and restrictions society imposes upon him. "He may rightly ask for an opportunity of laboring and of exchanging the produce of his labor for necessities. He must be content to gain as good a livelihood as the circumstances permit; and if he can not employ his powers to the best advantage, if he must work hard and fare scantily, these evils must be counted among the penalties of his transgression—the natural

reaction of his wrong-doing." (*Prison Ethics*, page 169.)

On this self-maintenance, equity sternly insists. "He is confined that he may not further interfere with the complete living of his fellow-citizens—that he may not again intercept any of those benefits which the order of nature has conferred on them, or on any of those procured by their exertions and careful conduct. And he is required to support himself for exactly the same reasons—that he may not interfere with others' complete living—that he may not intercept the benefits they earn. For, if otherwise, whence must come his food and clothing? * * * From the pockets of the tax-payers."

These taxes for the support of convicts are the equivalents of the benefits earned by honest labor. These earnings, in other words, are means to a complete living. If the tax-gatherer takes this fund for the benefit of the convict, the conditions of complete life are broken. The convict commits by deputy a further aggression on his fellow-citizens.

On the other hand, if the products of the convict are sold, he again becomes a menace to free labor. Why, then, tax society to maintain murderers who have forfeited all rights? Furthermore, why not work convicts on roads and force them to do the drudgery of society in other fields of industry that do not interfere with free men? Thus, to the commonly assigned objects of punishment, Spencer adds the biological necessity that forces society to restrain all who interfere with the laws of complete living. So long as we live in a world of physical limitations and animal necessities, so long as there is a limit to the aggressions that may be permitted without interrupting

or even ending human life, just that long **must** we apply to all aggressors so much force as shall be requisite to re-establish the laws of complete living. In a world such as ours, mere passivity, under etherealized conceptions of duty, can not guarantee the protection of life and property; hence punishment, even to the extent of the death penalty, is justified by the fundamental laws of life.

FUNDAMENTAL CONDITIONS.

In his entertaining and illuminating essay entitled **Absolute Political Ethics**, Herbert Spencer says: "If it be admitted that life can be maintained only by certain activities, it must be admitted that when like-natured beings are associated, the required activities must be mutually limited; and that the highest life can result only when associated beings are so constituted as severally to keep within the implied limits. * * * These are *a priori* truths which admit of being known by contemplation of the conditions—axiomatic truths which bear to ethics a relation analogous to that which the mathematical axioms bear to the exact sciences. * * * And now observe a truth which seems entirely overlooked; namely, that the set of deductions thus arrived at is verified by an immeasurably vast induction, or rather by a great assemblage of vast inductions. For what else are the laws and judicial systems of all civilized nations, and of all societies which have risen above savagery? What is the meaning of the fact that all peoples have discovered the need for punishing murder usually with death? How is it that where any considerable progress has been made, theft is forbidden by law, and a penalty attached to it? [The reader should note that Mr. Spencer does not derive the gallows from barbarism or savagery. EDITOR.] * * * No cause can be assigned save a general uniformity in men's experiences, showing them that aggressions directly injurious to the individuals aggressed upon are indirectly injurious to society. Generation after generation observations have forced this truth on them; and generation after generation

they have been developing the interdicts into greater detail. That is to say, the above fundamental principles and their corollaries, arrived at *a priori*, are verified in an infinity of cases *a posteriori*."

In other words, human experience, covering wide vistas of time, is in itself a great fact to reckon with when we come to the consideration of penal codes. Under all flags and religions, from pole to pole, and from the dawn of historical knowledge down to this very day, the wisdom of the ancient law has been sustained. Life for life, the ancient sacrifice, is still justified by human experience.

Just here it may be well to say a word in defense of both savagery and barbarism, two essential and marvelous steps in the progress of the human race, or, rather, two states through which man has passed.

In flippant shallowness it is often charged that savagery and barbarism were wholly worthless, wholly brutal throughout their ramifications. To say that this or that is a relic of barbarism is considered a final consignment of the rejected law or custom to the junk pile of history. Although neither savagery nor barbarism gave us the gallows, both have given us wonderful achievements. Morgan's unparalleled **Ancient Society** (page 41) tells us that savagery was the formative period of the human race. Commencing at zero in knowledge and experience, without fire, without articulate speech, and without arts, our savage progenitors fought the great battle, first for existence and then for progress, until they secured safety from ferocious animals, and permanent subsistence. Developed speech and the occupation of the entire earth followed. The earliest inventions were the most difficult to accomplish because of the feebleness of the powers

of abstract reasoning. The bow and arrow, slowly and painfully invented and developed by savages, was the beginning of the conquest of the globe.

SOME BARBARIAN GIFTS.

Emerging from savagery to barbarism, man was better equipped for the great battle of the ages; so the barbarians gave us the domestication of useful animals, the discovery of the cereals, the use of stone in architecture, and the process of smelting iron ore. The chisel, the hammer, the anvil, the sword, and the plow were the harvest of the secret of smelting. All civilization rests on the fundamental achievements of the barbarians. The barbarian wrought out all the elements of civilization except alphabetic writing. Man's achievements as a barbarian should be considered in their relation to the sum of human progress; and we may be forced to admit that they transcend, in relative importance, all his subsequent works. (See **Ancient Society**, page 31.) Homer tells us of the great achievements of Aryan society before it had emerged from barbarism. He tells us what the ancient Greeks had accomplished during barbarism, and their achievements constitute a marvelous chapter in human history.

We owe a wonderful debt to ancient man, who brought forth our ancestors under frightful conditions, struggling for thousands of years to conquer the globe; to manufacture human speech from the winds he breathed; to emerge from trees and caves; to invent agriculture and the alphabet; to lay the foundations for all we know and enjoy to-day.

John Burroughs tells us that in early Tertiary times our ancestor was a small, feeble mammal, physically powerless before the great carnivorous enemies and

the flying monsters of the globe. But man, by the rude weapons of force and cunning, has survived the war of the elements, the bloody duels of countless ages of superstition, war and cannibalism, the black nights of history, the cruel misfortunes of the yesterdays that we like to forget. "Man has never been coddled; fire, water, frost, gravity, hunger, death, have made and still make no exceptions in his favor." Burroughs' *Time and Change*, page 192.

HOW MAN HAS MARCHED.

Man has been marching from ways of violence into paths of peace—swimming Silurian and Devonian seas, climbing the sandstone steps, over limestone, conglomerate and slate; he has stemmed the floods and escaped from the convulsions of Carboniferous times, unharmed by the earthquakes and volcanoes that rent the globe. Through eruptions, cataclysms, great tidal floods of angry seas, past ice and flame, escaping from dragons and monsters of the deep, he has come into his present estate. We owe thanks to the forgotten heroes of deep antiquity for their victories over creeping, swimming and flying monsters; over hunger, nakedness, cold, superstition, and the countless scourges that pursued them from the unclothed and uncradled infancy of cave and jungle, in their march over the far-flung battle lines that lead from the dust of hundreds of thousands of years ago to the glories and splendors of the great world of to-day.

But great juridical systems, with courts, penitentiaries and the machinery for carrying out the edicts of the Goddess of Justice, blind but armed with accurate scales, belong to the later stages of human development. The Avenging Angel, guarding the rights

of even the humblest, jealous of every infraction of the social order, ever ready to confine or extirpate the anti-social, the wild beasts who rob and slay, is, in its more perfect form, a development of later times. Neither savages nor barbarians gave us the Mosaic Law, Magna Charta, or the Declaration of Independence. Christianity spread the gospel of the Destroying Angel, demanding the ancient sacrifice of life for life.

Those who would solemnly and lawfully end the lives of a few vicious members of society to prevent their class from ending many innocent lives, are even kinder and gentler than the misguided sentimentalists who tremble at the thought of capital-punishment. But the stern logic of events, the demands of Retributive Justice, the terrible judgments of righteousness, must be executed by the Avenging Angel as a terror to evil-doers; for "he is the minister of God to thee for good"—a revenger to execute wrath upon the wicked.

CHAPTER IV.

Christianity Justifies the Death Penalty

CAPITAL-PUNISHMENT and kindred questions are viewed by devout people in the light of theological problems. In spite of the fact that some Christian ministers maintain that the death penalty is contrary to the teachings of Holy Writ, the overwhelming burden of authority is to the effect that the Bible solemnly commands that the murderer be put to death, lest he defile the land.

Let us examine the question from the point of view of the Roman Catholic Church, then view it as interpreted by one of the greatest Protestant clergymen who have ever discussed the problem—Dr. George B. Cheever, the eminent Greek and Hebrew scholar and Biblical commentator.

The **Catholic Encyclopedia** has an exhaustive article on the subject of capital-punishment, which it presents from the historical as well as from the Biblical point of view. It quotes Exodus xxi. and Esther ii., 22, 23. The latter citation gives the incident of hanging men on a tree. The **Encyclopedia** shows that capital-punishment was common among the Greeks; that it is not contrary to the teachings of the church; that it was stoutly defended by the illustrious Jeremy Bentham;

and that it is, finally, a just power of civil governments, and is so recognized by the Church.

Elsewhere in this work elaborate quotations have been made from a series of articles by the Reverend Father William Barry, one of the most learned prelates of the Church. See the index for this discussion, most of which, however, is from ethical rather than theological points of view. See pages 143 to 146.

An excellent Catholic work on moral philosophy is by Joseph Rickaby, S. J. It contains a justification of the death penalty. The learned author quotes Romans xiii., 3 and 4: "For rulers are not a terror to good works, but to evil. * * * For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain; for he is the minister of God, a revenger to execute wrath upon him that doeth evil."

Aristotle's *Ethics*, x, ix, is quoted to the effect that law has a proper coercive function, **appealing to force**, notwithstanding that it is a reasoned conclusion of practical wisdom and intelligence. No odium attaches, therefore, to its use of force.

Rickaby argues that occasions are conceivable when the infliction of capital punishment may become unnecessary, but he maintains that **the power to inflict it**, based on righteousness, must be reserved by the state. He adds: "If men ever become ideally virtuous, the right to visit gross crime with death can not hurt them, but it will strengthen their virtue. Death is the penalty that most exactly counterpoises in the scales of justice the commission of a murderous crime."

There are commentators who take a stricter view, contending that we have no right to abrogate the command of God to put the murderer to death, since God's

word on that subject is a commandment for all races and all time.

ANOTHER GREAT CATHOLIC SPEAKS.

The Reverend Father John J. Ford, S. J., vice-president and prefect of studies at the University of St. Ignatius, San Francisco, has entered the field of controversy many times in favor of the death penalty, arguing from many points of view, as heretofore shown in these pages. He has also touched the question of Biblical authority. He says capital-punishment has been universal and most constant since the announcement of the Gospel; "and twenty centuries of Christian civilization are not to be despised so easily." He quotes Exodus xxi., 12, and Leviticus xxiv. in favor of the death penalty. Moses, Joshua, Samuel, David, Elias and other holy men used this power and put to death malefactors. He also quotes Paul's Epistle to the Romans as to bearing the sword as God's minister. Paul here tells us that the right of the sword, or capital punishment, has been given by God to rulers against criminals. He bears it as a symbol of his right to put to death the wicked for the security of society.

"True, Christ, the God-man, said in the New Testament, **Thou shalt not kill**, but as God he had said the same thing in the Old Testament. * * * Unless, then, one wishes to say that Christ is not God, or that he is self-contradictory, it must be admitted that the words of the Fifth Commandment have not the meaning ascribed to them by some of our sensational abolitionists. Their obvious meaning, taken in the light of all revelation and reason is, **Thou shalt not kill by private authority, except when it is necessary in case of self-defense.** But this does not forbid the killing of a

man by public authority in a just war, or when, as in the case of a great criminal, it is necessary for the common weal. For Christ is God, and God does not contradict himself. Besides, it is an established canon of criticism, and especially of Biblical criticism, that the obscurer passage should be interpreted in the light of the clearer."

The learned Jesuit concludes that capital-punishment, under Christianity, is fully warranted. He argues that Christianity has corrected the glaring abuses, harshness and evils of the past, has elevated mankind and eliminated evils, but it has stood and must continue to stand by the sanction of the gallows. The entire race of man has not maintained capital-punishment in vain. Two thousand years of Christian ethics are added to the verdict of deep antiquity in favor of the gallows. As to the remote danger of hanging innocent men, Father Ford says they die martyrs to righteousness. [He thinks the guilty far more liable to escape than the innocent to be punished. Use every precaution, then take the chance that goes in all human transactions, for all are dependent on the fallibility of mankind's judgments. There is danger of error in all human judgments, but this is not a valid reason for suspending human judgments and setting murderers free. When mercy and pardons replace justice, the citadel of justice is destroyed, license and promise are given to criminals, and society is exposed to grave dangers. When mercy replaces justice it becomes the sister of violence, giving rebellion foothold.]

He concludes that if the taking of human life is ever necessary for the common good, it is justifiable. It is clearly necessary in self-defense and in a justifiable war. So slaying a man is not intrinsically an evil,

but only when it is unjust. If it were intrinsically an evil to slay a human being, it could never be allowed, even in self-defense. Nobody holds to this absurd view.

Thomas Aquinas (Ethics) says that an offending member may be amputated when necessary to the health of the body, also the corrupt member of the body politic may be slain by the ruler for the common good. The lesser right must yield to the greater—the preservation of society and its safety are more important than the preservation of the life of one of its offending members.

Possibly the most sweeping and logical presentation of the case ever made from the Biblical point of view is that by Dr. George B. Cheever, who careered brilliantly in New York and the New England States before the Civil War and immediately following it. He maintained the right of the death penalty in a series of public debates, in discussions in the **North American Review**, and in two works on the subject, **A Defence of Capital Punishment**, in which he was aided by Tayler Lewis, of the New York Bar, and **Punishment by Death; Its Authority and Expediency**. It is the intention of the present author to epitomize the conclusions of these great works, following pretty closely in the footsteps of the author as to arrangement, and using much of his language.

The eminent divine maintains that God made a law for the human race when Noah was making a new start. The Noachian code made murder punishable by death. The Jewish Dispensation followed the Noachian law. Later, Paul stood by that law when he was being tried before Festus, and almost the last thing in the

Bible, a reference in Revelation, sustains the ancient law, which Christ in no way amended or repealed.

WHERE THE BURDEN OF PROOF LIES.

The authors of the first volume referred to in this Cheever discussion maintain that the burden of proof is on the abolitionist to show that the common interpretation of the Scriptures has been and is now wrong. **Prima facie**, as the lawyers say, the common-sense and practice of mankind, the dictates of religion, the precepts of morals, and the general current of the world's legislation are sound. The experience of the wisest and best of mankind may not be lightly set aside as worthless. The usage of all civilized and highly religious peoples creates a favorable presumption of right. It is the abolitionists who are innovators, coming to us with new experiments. They lightly denounce as inhuman and barbarous a law given by the Almighty (once to all the race) and subsequently to his own peculiar and favored people; they oppose the current of ancient and modern legislation; they are putting forth new views of law, of government, of penalties, and of the fundamental principles of ethics and political philosophy.

The abolitionists lay claim to extra benevolence and superior humanity, pretending that their views are transcendently Christian, whereas Christianity, based on both the Old and the New dispensations, commands capital-punishment for murder. They would dodge, forget, or interpret the meaning out of the Scriptures. They would make **pain**, or **poena**, which means **suffering for crime as a penalty for transgression** something soft and beautiful—a home for the unfortunates. They would forget all thought of the wrath to come. They

would forget that judges were called **Elohim**, as standing in the place of God. (See Exodus xxi., 6, also xxii., 7 and 8.) See Deuteronomy xix., 17, where it is shown that the man standing before the priests and judges is really before the Lord. The Scriptures prescribe the death penalty for murder (wilful murder), not for reformation nor deterrence, but because **the land was polluted with blood** and the whole people were guilty until the expiation was complete.

AN ADEQUATE PENALTY.

Human conscience, the moral sense, the intuition, the perception of the fitness of things, declare spontaneously that the pain of death and the loss of life fill the idea of the appropriateness of the death penalty for murder. To this effect all civilized mankind have ever lifted up their voices. Aristotle quotes old Empedocles to the effect that the death penalty is the statute of no one nation, but a universal institute, as wide as the air and as extensive as light. In all history, murderers have now and then been softened in the presence of death, having no unkind feelings toward witnesses, judges and jurors.

If there is a crime which, in moral enormity, stands out beyond all others, it should have attached to it a penalty which, in the same ratio, transcends all other penalties. There must be something final and highest from which, as a standard, every other gradation must receive due estimate.

Take away the death penalty for cold-blooded murder, and our whole system of criminal jurisprudence and all its reforming and preventive power will suffer proportionate deterioration.

Many sincere Christians try to evade the Old Testament, but the New Testament can not stand without

the Old. No Old Testament, then no revelation, no authority for the law. We must take the entire Bible or give up all conception of the Word of God as contained therein. The modern squeamishness regarding the Old Testament is unsound. Deuteronomy teaches the love of right and hatred of wrong, but it also commands the duty of force in resisting the public enemy. The New Testament does not clash with this view. Even the mild and merciful Saviour speaks in thunder tones, and in a style which no prophet had ever dared to assume, of the doom of the wicked, and of "the wrath to come." Revert to the scenes of Calvary, and you can find no relaxing or lowering of those dread ideas of law and penalty and retributive justice that appear prominently in the Old Testament. "Resist not evil" does not extend beyond the condemnation of individual revenge, but the doctrine of resist not evil has long ago been abandoned by Christians.

Christ no more meant to abolish the law of force than did Moses in the Sixth Commandment;* and that, too, in the face of the most express declarations recorded at the same time and emanating from the same source.

THE ANCIENT STATUTE.

It is said that the example of the death penalty is bad. God made the death penalty, it is contended, for a ferocious and barbarous people. This is not true. On the contrary, the statute was first universal, for all men and all time. Later it was for a learned, a gentle, and a chosen people. Did God establish the death penalty, if it corrupts the public, as is maintained, in order to make his people more revengeful and vindic-

*The Catholics make this the Fifth Commandment.

lence," as the Scriptures say. In this connection, remember that the Hebrew text is simple, plain and intelligible. It is here singularly free from idioms and uncertainties.

In his work, **Punishment by Death**, also in his debates with J. L. O'Sullivan, a lawyer, Dr. Cheever says that Schlegel plainly indicates that in the writings of Moses, whatever is meant to be a practical law is expressed with the greatest possible accuracy and precision. Schlegel is certainly a name to conjure with. This rule of interpretation is clearly applicable to the law against murder. And when God says, "At the hand of every man's brother will I require the life of man," the meaning is specific. If you should then ask, **How will this life be required**, there instantly follows the great enactment, familiar for so many generations, **Whoso sheddeth man's blood, by man shall his blood be shed**.

The argument from Scripture, says Cheever, is plain and powerful, because it is easy to distinguish between what is local and transitory, on the one hand, and what is universal and permanent on the other.

GOD GAVE THE PRIME LAW.

The reader should remember several vital and fundamental facts, says the great commentator: First, the prime law was not that of Moses, but of God. Next, it should be borne in mind that not one law was abrogated by the Saviour. Then one should remember that these old laws contain the doctrine of love, the law of courtesy, of kindness, of benevolence, and of protection to strangers and the poor; also, above all, love of neighbor.

In other codes and concerning other subjects, also,

the law of Moses, contrary to some interpretations, was mild and full of gentleness and equity, as the great Graves shows in his lectures on the Pentateuch. In truth these laws foreshadow the Sermon on the Mount. Next, the code can not be regarded otherwise than as a collection of the tenets of a superhuman wisdom. The direct argument in favor of capital-punishment, taken from Scripture, begins with the prime commandment to Noah. All commentators on the meaning of Holy Writ agree to this interpretation. Not one of the eminent commentators holds that the interpretation is permissive, as the experts on hermeneutics say, but it is mandatory. Why? Because there is wonderful explicitness, compactness and authority in the terms in which it is expressed. The obligation of this Biblical command has never ceased for a moment. It has never been repealed, either in the Old or the New Testament. Murder must ever remain the chief crime and sin against God and society.

Murder is everywhere specially branded as the highest crime that can defile the country. Numbers xxxv., 30 to 34, emphasizes the fact that there is no substitute for the life of the murderer, his crime having defiled the land so that it can not be cleansed of the blood shed therein but by the blood of him that shed it. Exodus xxi., 12, 13 and 14 bear directly on this crime, and permission is given to take the criminal "from mine altar, that he may die." Leviticus xxiv., 17, and Deuteronomy xix., 10, and many other parts of the Bible show the heinousness of murder in the sight of God. The murderer shall not pollute the land which his crime has defiled. This thought is repeated again and again. No refuge is to be available to him, and in some cases he is to be delivered over into the hands of

the avengers of the blood—the relatives who then had the right to put him to death. He was to be taken from the very altar of the temple of God and put to death. Deuteronomy xix., 10, says, “Thine eye shall not pity him.” In other words, God would prevent the cheapening of human life by the cheapening of the punishment or by a pity not deserved. In an emphatic and often reiterated command God establishes and reasserts the statute against murder, making the specific penalty death in every instance. “Ye shall take no satisfaction for the life of the murderer,” rings again and again throughout Holy Writ in terms that can not be misunderstood.

This was God’s legislation in the covenant with Noah, set forth in his law against murder in Genesis ix., 5 and 6—the primal, “Whoso sheddeth man’s blood, by man shall his blood be shed.” It is also his legislation hundreds of years later, for Noah’s era was from 2948 B. C. to 1998 B. C., the Deluge having occurred about 2348 B. C., while the period of Moses was from 1571 to 1451 B. C. But Moses, after this long lapse of time, is given the same law that was promulgated through Noah. The law is intended to emphasize and reiterate the punishment for murder among the Hebrews, and to establish that law again so firmly that there may remain no shadow of doubt regarding the intention of the omnipotent law-giver. no possibility of evading the expiation prescribed in the death penalty.

CHRIST DID NOT ABROGATE LAW.

The learned Erasmus, that genius who studied by his lonely lamp to interpret the Word of God, held that Christ did not repeal the ancient law, and that

he had no reference whatever, either directly or by implication, to the abrogation of the statute given to Noah. Not one of his teachings in any way abrogates the death penalty. The change from the Jewish to the Christian Dispensation did not remove the sanction of the older law. Though Paul says, "Avenge not yourselves," he immediately speaks of the magistrate as bearing not the sword in vain, but as a revenger, as the minister of God to execute wrath on the evil-doer. In other words, capital-punishment and the mild spirit of the Christian Dispensation are not inconsistent. "He that killeth with the sword, must be killed with the sword." This is not from the Old Testament, but from the very last of the New—Revelation xiii., 10. See also Matthew xxvi., 52, where it is said that they who take up the sword shall perish by the sword—that is, those who do violence shall die by violence.

Romans xiii., 1-4, gives the civil magistrate power over men, saying that rulers are not a terror to good works, but to the evil. The ruler is there described as one who beareth not the sword in vain. All these New Testament references recognize the divine appointment of human government, and the validity of the penalty of death. Paul recognized the justness and solemn authority of the death penalty in his own person when he said: "I stand at Caesar's judgment seat, where I ought to be judged. * * * For if I am an offender, or have committed anything worthy of death, I refuse not to die. * * * I appeal unto Caesar." See Acts xxv., especially 10 and 11 for the trial of Paul before Festus and his appeal to Caesar.

It will be noted that Paul, who certainly knew what Christ taught, appeals to no Sermon on the Mount, to no law of love or speech or example of Christ, to

no provision of the Gospel abolishing the ancient death penalty; but in full acknowledgment of the righteousness of that penalty for the guilty, he appeals unto Caesar. This must be regarded as absolutely decisive of the question at issue.

Paul knows there are crimes worthy of death, and that human governments may rightfully inflict the penalty of death for such crimes. The argument thus tested in Paul's own case is simply incontrovertible by the rules of logic and polemics. In other words, the Christian Dispensation did not annul the Jewish regarding the death penalty. At the opening of the Christian Dispensation the great Paul promulgates the ancient law, the Noachian ordinance, the Mosaic commandment.

NOAH WAS ASSURED BY GOD.

It is interesting to examine the case yet more minutely, analyzing it from the foundation. It should be remembered that God assured Noah that the divine providence would secure the punishment of bloodshed by death. When God resumed his legislation on this subject, through his minister, Moses, he took the imperfect and in some respects dangerous institution of private vengeance by the relative of the murderer's victim, and hedged it around with such other forms as were necessary at once to preserve its power, prevent its abuse, and give the criminal a trial. But all this after legislation bears direct reference to the first broad statute enacted with Noah, **the ordinance designed for all posterity.** That ordinance confers directly upon the civil magistracy the power of the sword, the power of life and death; in other words, as the highest and most awful sanction of human govern-

ment. It clothes the administration of righteous law with divine authority. It confers power which God alone had the right to confer. It takes the highest function of government as a personification, exponent, or representative of all its just functions, and by surrounding it with all the solemnity of a commission from God, establishes forever the principle set forth in such explicit language by the Apostle, that "the powers that be are ordained of God; and whosoever resisteth power, resisteth the ordinance of God; for the ruler is the minister of God, bearing not the sword in vain."

God set up a barrier unknown to the Antediluvian world. It restrained the malice, cruelty, hatred and violence of men's passions, which were held by no wall of law prior to the Noachian ordinance. God comforted Noah, who remembered the wickedness and crime of the Antediluvians with feelings of terror, by saying that murder should no longer go unpunished; there should be a greater carefulness of human life, a greater regard for its sacredness. It should be remembered that in the Antediluvian world a far milder course had been chosen in vain, for the mildness of the Antediluvian law (like that now being advocated in the United States) filled society with violence and crime. God spared Cain, and the consequence was that every murderer felt secure, just as murderers now feel secure if they can but escape the gallows. This was the very reasoning of Lamech, who slew a young man. When his wives feared for his fate, he comforted them by referring them to God's lenity in the case of Cain. Lamech, by the way, was almost the last lineal descendant of Cain, and his

murder was perhaps as wicked as that of his ancestor.

So wicked did the ancients become under a code of lenity that Grotius quotes the following from the great Thucydides as to Antediluvian crime: "It is probable that in former days heinous crimes were slightly punished; but when in time these punishments came to be despised, they were changed into death."

At any rate, the earth was filled with violence, and the Deluge followed; and then, with Noah as the new world's second progenitor, God established a code of more efficient and salutary severity. It was God's consolation to the world, as if he had said: "Noah, fear not! If there be a Cain in your posterity, he shall be slain, for whoso sheddeth man's blood, by man shall his blood be shed." This law was for the purpose of making the life of the individual a sacred charge upon society. God was not legislating for a race of savages, as is sometimes ignorantly contended. His statute was for the germ of a splendid people of refinement, a cluster of families with all the culture and knowledge of the Antediluvian world. This law was made when there was more piety in the world than there has ever been during any subsequent period. The law was adapted to the world in its best state, and the same law must remain in the period of its greatest glory. Three-fourths of the world were in a sense Christians, for Noah, like Abraham, saw Christ's day, and believed in the foreshadowed atonement. The Noachian law, far from being the product or the necessity of an uncultivated or irreligious age, was rather the offspring and the excellence of cultivation and of piety. It was God's law, set in the angry clouds of human passion, binding and restraining them. There

was great piety and wisdom when the Noachian code was made, and it was re-enacted after many centuries had elapsed, **still more explicitly, for the wisest, most refined and religious community in the world's history,** for the spiritual and moral ancient Jews; but even then murder had, "the primal, eldest curse upon it." It was a rank offense that smelled to Heaven, and the voice of the slain man's blood cried from the ground, as of old. And ever since those olden times the crime of deliberate murder has remained so enormous, so brutal, so shocking and cruel that the whole moral sense of every community where it is committed rouses up, as then, and calls for penal infliction—and this infliction is not cruel retaliation, not malice, but the demand for justice, the intuitive and spontaneous expression of the moral sense of what is right and proper.

God's law as thus expressed is perfectly natural. The moral sense of the community is based on this principle: No man of right feelings ever sees a brutal man inflict pain and abuse on either man or beast without wishing to see the malefactor punished; it is a proper, deep and altogether human and righteous feeling that punishment is due; that the wicked ought to **feel** the wickedness of his conduct **through** suffering. The sullen, hardened brute must be made to suffer. This view has been deemed sound by every great writer and philosopher from Grotius to Spencer.

Grotius says that the ancient Rhadamanthean law is that he that doeth evil shall suffer evil. Plutarch and Plato agree. Hierocles says that **punishment is medicine for wickedness.** The death penalty has no more revenge in it than life imprisonment or any other infliction. It has justice in it, and the moral sense of

the mind intuitively demands and regards **justice** as the chief object of this infliction. Death brings justice, the good of society, and the possible repentance and spiritual reformation of the offender. Death often leads to conversion, whereas life imprisonment often prevents it and makes a harder wretch of the prisoner.

SUFFERING IS A JUST PENALTY.

The penalty of violated law is **suffering**, not **reformation**, which is always a secondary affair. To make reformation primary is as if we should say, "You wicked wretch, pray commit murder, and we shall at once reform you and make you happy." Reform must ever remain a by-product, not a chief end of punishment. We punish because punishment is deserved and just. Punishment is a **vindication** for the violation of a righteous law.

A great German romance writer exclaimed, as he lay dying, "Only life! this sweet life! life at any price, even with suffering—life! life!" There is no passion so strong as the love of life, hence no fear so great as the fear of death—of what comes after death. Men fear judgment, the unknown future, the untried eternity. The soul of the guilty is unprepared for the final leap in the dark. Seneca and Eusebius took the view that death is a great offering to the murderer himself, freeing him from spiritual obliquity. The Reverend Mr. Cotton, for more than a dozen years the chaplain or ordinary at Newgate, testifies that he never saw a case of genuine conversion **except in prisoners who were to be executed**. Such has been the testimony of many other clergymen

who have witnessed the solemn scenes marking the last hours of condemned men.

The Prison Discipline Society of America reported, in 1846, that the death penalty could not be abolished without great danger to society.

Every part of the divine covenant with Noah was marked with great mercy, as if the divine justice had been fully displayed and vindicated with earth's cleansing by the Deluge; and now God blessed his creatures, formed new institutions and revealed promises for their good. As an institution of benevolence, the death penalty was promulgated for the welfare of all mankind.

The ordinance in Genesis is a command, nothing else. This has been the decision of all the greatest commentators on the text of the Bible. Hammond, Grotius, Calvin, Matthew Henry, Michaelis and Rosenmueller take this view. The Hebrew construction permits of no other interpretation than that the word is one of command. The great scholars like Gesenius, Stuart and Nordheimer say that the **shall** makes an indisputable imperative in the **by man shall his blood be shed**, or in whatever form the text is rendered. This view is corroborated in Proverbs xxviii., 17, in "**shall** flee to the pit," which means shall immediately die. It can not mean **will**, for he will not die if he can help it.

The statute has the following great points in its favor: Priority over all other legislation; comprehensiveness; unlimited duration. It is clearly meant for all mankind, and its authority is to continue as long as the race. As it is solely from God, God only can repeal it. He never has repealed it, and it is binding to-day.

Some opponents of the death penalty say the law

has been repealed. When did its application stop? That first law of God in this world is alive to-day. You can not point to a spot in the stream of time or history and say, "Here that law stops." Under an old rule, **the law stands while the reason remains.** The Saviour said that not one jot or tittle should pass from the law till all should be fulfilled. No government has the right to legislate against divine legislation, nor has any government the right to abolish laws against stealing and robbery. The statute is even more binding than the Decalogue, for the Decalogue was addressed, "Hear, O Israel," but the prefix to the statute against murder was addressed to all the inhabitants of the world.

A law without a penalty is nothing. It would fail to protect the innocent against the passions of the depraved. Twelve hundred years after that prime law was promulgated we find a temple in a land free from idols, in a wonderful country of cedar and palm, a bright spot on the earth. The spirit of holiness permeates the people, an elevated and a favored race. Do we find this people rejecting the ancient code as barbarous? Does God repeal it? We open a book of divine legislative wisdom, communicated to their great law-giver, and we read: "Whoso killeth any person, the murderer shall be put to death." We read also, "Ye shall take no satisfaction (substitute) for the life of the murderer, * * * but he shall surely be put to death." It is said that "blood defileth the land," and again that "the land can not be cleansed of the blood shed therein, but by the blood of him that shed it." See Numbers xxxv., 30-34. Does this appear to be an abrogation of the Noachian code?

The common law of the world, expressed to Noah, and many local enactments for particular reasons and a local people uphold the one ancient principle. A thousand years after the Mosaic dispensation Jesus said: "Think not that I am come to destroy the law or the prophets. I am not come to destroy, but to fulfill."

THE SWORD JUSTIFIED B. C.

Thirty years after the Crucifixion (Romans xiii., 1-4) the ruler who bears the sword is said to be a minister of God to execute wrath upon the wicked. This passage shows the divine origin of government and the power to inflict death. The sword is always a symbol of power, the power of the state. Paul's sanction shows that he realized that the Christian Dispensation was the same as the Noachian ordinance. Since the Roman Government had not abolished capital-punishment when Paul spoke before Festus, no other possible interpretation of his words is to be thought of for a moment. Paul was not addressing a community of Quakers. The phrase "bearing the sword" meant only one thing in those days—the power over life and death.

The pen of inspiration was never dipped in deeper colors than the crimson which marked the primal curse on murder. Isaiah complains that the people had grown lenient and that the land was filled with wickedness.

When the Jewish code was strictly observed among the people, life in Jerusalem was more sacred than anywhere on the globe. The sense of the sacredness of life permeated the souls of the people. King David, about to die, could not rest while he remembered that

the crime of murder in one of his own captains had gone unpunished. Moved by the invisible spirit of Law and Justice, David left a dying injunction to his great son Solomon that the blood of Amasa and Abner, whom Joab slew, should be avenged as directed by God's law.

When God says, "Resist not evil!" he speaks to individuals, not to civil governments, which were authorized to resist evil and punish crime. God's own vengeance is executed by the sword-bearer, the ruler. Though an individual man might forgive his enemy, even the murderer, he must not shield that murderer from the lawful authorities or from the penalty of the law.

The justice of the death penalty for murder has always been recognized by humanity. Its authority, even among men, is from a time transcending the memory of man and the records of history. Aristotle found it was not peculiar to Athens, Macedon or Persia, but it was coextensive with mankind and prevalent among all civilized and some barbarous nations. The most ancient of poets called the death penalty a holy law.

The golden chain of argument for the validity of the death penalty runs like a furrow of light from Genesis to the Apocalypse. (See Revelation xiii., 10: "He that killeth with the sword must be killed by the sword.") All the great commentators refer to Genesis for the authority of John. The Greek verb used in this connection or referring to the death penalty always carries the idea of necessity, propriety, fitness and moral obligation. This is a point that should be borne in mind at all times.†

The law requiring a life for a life is not vindictive,

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human life forbids its being wasted, and commands its increase.

According to Knobel and other commentators God had established no covenant with the Antediluvians, but his covenant with Noah, with his race, and with the whole earth (Genesis, ix, 8-17) instituted humane culture and order, especially of the magistracy, of the penal judicial office, including personal defense and defense in war. See page 330.

On page 331 it is announced by the commentators that the fundamental principle for all time is this, that the murderer, through his own act, has forfeited his right to human society, and incurred the doom of death. The pre-Noachian era, under Adam and his descendants, had been a failure. God's lenity with Cain was a revelation of man's iniquity when the death penalty is absent. After Cain's life was spared no murderer had the fear of God in his heart. By the curse of God Cain was punished by banishment, in a sense, to the land of Nod. He was excommunicated and driven by self-banishment away from his fellows.

The divine statute (Genesis ix, 6) is sometimes assailed on grounds that are no less an abuse of language than they are a perversion of reason and Scripture. Reformers, so-called, are likely to call the taking of the life of the murderer revenge, no distinction being made between revenge and vengeance. Revenge would be the proper word to use if punishment were from expediency only, as the life imprisonment proposed by the abolitionists in lieu of the gallows would be. The word revenge always denotes something angry and personal, while the word vengeance is the requital of justice—holy, invisible and always free from passion. In ancient times, as shown later, it was hedged about with impressive expiatory ceremonies, all intended to remind the offender of obligation to God.

On this blunder, although it is often a malicious misrepresentation, the anti-gallows advocates have coined the almost senseless phrase "legalized murder." By the same blunder or malicious interpretation there is a widespread attempt to set the Old Testament in opposition to the New,

notwithstanding the express words of Christ to the contrary.

If the murderer is punished by death simply because he deserves it, also because God has commanded it, and because the magistrate and executioner are only carrying out the command of God, then all opposition to the death penalty on the ground that it is revengeful, must fall to the ground, having neither force nor relevancy.

Under the strictly orthodox view, reformation and prevention will never be effected under a judicial system which shuts out all moral ideas. There may be a seeming reform, but it has no ground in conscience, being accompanied by no conviction of just deserts and the duty of expiation. Deterrence is really in the terror of invisible justice.

Under the view of the commentators men are not merely permitted to take the life of the murderer, but they are unconditionally commanded to do so. In no other way can the community itself escape the awful responsibility of violating a command of God on the one hand, and suffering from an increase of crimes of violence, on the other. Impunity makes the whole land guilty. From time immemorial, in pre-Christian and in non-Christian countries, as in Christian lands, "a voice cries to heaven." This is not an idle phrase, for conscience, the judgment of mankind in all ages, is really personified as a voice. Murder unavenged has always been regarded among right thinking races as a pollution of the land. See Numbers, xxxv, 31, 33; Psalms cvi, 38; Micah, iv, 2. Here the land can not be cleansed of the blood that is shed therein, but by the blood of him that shed it.

Such is the strong language of the Scriptures as we find it in Genesis, in the statute of the Pentateuch—a particular application of the general law—and in the Prophets. Such, too, is the expression of all antiquity—so strong and clear a voice of humanity from the far away yesterdays that we can only regard it as an echo of the still more ancient voice reported by Aeschylus and prevalent in almost terrific and revolting form in Greek tragic poetry, showing that the deliberate judgment of all our ancestors in every age and clime—the seers, statesmen,

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poets and prophets—has been that he who sheddeth man's blood shall himself be slain. Note this in Aeschylus:

There is a law that blood once poured on earth
By murderous hands demands that other blood
Be shed in retribution. From the slain
Erynnys calls aloud for vengeance still,
Till death in justice meet be paid for death.

Also note the following passage from far deeper antiquity, quoted by the commentators:

For blood must blood be shed. A law by eye
Thrice holy on the murderer's guilty head
This righteous doom demands.

A UNIVERSAL STATUTE.

In the solemn covenant with Noah and the race following him, which includes all succeeding ages, the statute commanding the death penalty for murder is universal—a law for all races and all time. It was not a particular law for the Jews, as sometimes glibly charged. The commentators say (page 333): "The particular law afterwards made for the Jews refers back to this universality in that repeated declaration which makes it differ from all other Jewish laws that do not contain that declaration, viz: 'This shall be a statute to you in all your places, in all generations.' The language is universal, the reason is universal, the consequences of impunity are universal." In other words, murder is as great an offense in one age and place as in another, and the punishment should remain unalterably as great as the crime.

The law but expresses the sentiment of all antiquity, a thing we may not despise in our search to ascertain what is fundamental and eternally right in ideas pertaining to ethics and jurisprudence. The law that prescribes capital-punishment for homicide has always been universal. In the far away depths of antiquity the very superstitions connected with the infliction of the death penalty, as shown in expiatory ceremonies, are evidence of the abiding sense, the deep conviction of the human mind that this crime, above all others, must have its adequate atonement; and that this atonement must be life for life, blood for blood. The Noachian covenant, however, must not be confused with the reference and teachings of Exodus regarding an eye for an eye, a tooth for a tooth.

The terrific language and harsh judgments of past ages, particularly in ancient Greece, only show the strength and universality of the feeling against the crime of murder, an offense always deemed so rank as to smell to heaven because of the eldest, primal curse upon it. In all ages, excepting possibly the present age of fads, there has been an innate sense of the justness on which the death penalty for murder is founded. Aristotle reckons the punishment of murder by death among the universal, unwritten laws referred to and thus named by Sophocles in the *Antigone*. No man knows whence these ancient codes against murder sprang, but it is known that they are the cumulative experiences of all generations of men, the judgment and conscience of the race as expressed concerning the one crime of crimes that has always offended rational human beings. The death penalty has been sanctioned from time immemorial by the wisest and best men of every race and clime. In the Koran the thought is expressed, as in other ancient books, that "he who slays one man intentionally and wantonly is as though he had slain all men." He is the enemy of society, of the race. He has committed an assault against humanity. As far as lies in his power he has aimed at the destruction of the whole human race, has defied the sacred codes of the ages, has polluted the land, profaned the works of God as represented in man, his image.

In Romans, xii, 19, and in chapter xiii, the magistracy is ordained by God to execute the divine law against murder—God's justice not merely delegated, but imposed upon society, thus making capital-punishment the very antithesis, the most opposite possible act to revenge. The judicial ending of a murderer's life, in obedience to a just judgment and pursuant to a fair trial, is a sacrifice, an expiation, and those who object to thus disposing of the murderer lose sight of the positive commandments of God. They also forget the relation between human and eternal justice. "For rulers are not a terror to good works, but to the evil."

Those who speak with contempt of the divine law, are constantly railing at society and branding it as the real criminal. Those who inflict the death penalty on the mur-

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derer in obedience of divine law, executing the decrees of justice on the enemy of mankind, are denounced as wicked criminals. Such critics snap their fingers at law and order and are carried away by a sentimentalism as dangerous as it is ridiculous.

"The powers that be are ordained of God. Whosoever resisteth the power, resisteth the ordinance of God." This is justification for governments, for the execution of law, and this part of the Scriptures makes non-resistance and the so-called doctrine of love impossible.

AN EPISCOPAL VIEW.

The Reverend Charles H. Chandler, of the Episcopal Church, San Luis Obispo, California, suggests the following:

"The penalty of violated law is suffering the consequences of one's violation of that law. Violation has two consequences—vengeance and (conditionally) remorse, or sorrow. Regarding the first of these, it may be said that the guilty one has violated a law governing man's personal welfare, as ordained by God. The rules governing man's welfare and regulating his conduct are of God, hence it is that a just God, true to himself, must exact vengeance, as you have defined the word in the foregoing. He exacts this vengeance through society, acting in his stead. In respect to remorse, the punishment of the murderer may, and often does, result in his sorrow for the act, which is remorse or penitence. Thus is there produced in him that condition without which he can not hope to deserve the forgiveness of God, either in this world or the hereafter.

"That the death penalty does not always produce remorse is no argument against inflicting it, for the reason that the effect of the penalty is conditioned largely by the individual himself. If he accepts the penalty in the right spirit the result follows naturally; hence it is that the only certain method by which the reformation of the individual may reasonably be expected is a secondary consequence following the sentence of death, and this really is the end sought by those who aim abolition of the penalty, although abolition would really thwart their aims. As all

nature revolts at murder, it should be punished in the way commanded by God—by death."

Thus we come back to the old law. "The murderer shall be surely put to death." And again: "This shall be a statute unto you throughout all your dwellings, in all your generations." See Ezekiel, also Numbers xxxv, 29, for the quotation.

Finally, the Commoner of April 11, 1913, contains an able article on the death penalty in Holy Writ, from the pen of Doctor H. A. Hughes. He shows that Christ taught that the wages of sin is death in the form of eternal punishment, which is more severe than hanging a man for murder. He taught everywhere the doctrine of rewards and punishments, as in the parable of the unworthy servant, and when he upset the tables of the money-changers and scourged them in the temple. The babe knows that kisses and caresses will be its reward for obedience, and some slight punishment for disobedience.

Four attempts were made on the life of Queen Victoria during the first year of her reign. Parliament met and passed a law prescribing the death penalty for an attempt on the life of the sovereign. She was never again attacked during her long reign.

As Solomon had three murderers put to death during the building of the temple, so we should put our murderers to death to-day.

CHAPTER V.

A Summary of Opinions

THERE is far from harmony among the advocates of the abolition of capital-punishment. They see the abuses of the pardon system, the dangers to convicts and keepers who are thrown in contact with desperate men, and the farcical brevity of so-called life terms.

In *The Review*, a monthly periodical published by the National Prisoners' Aid Association (March and April issues, 1912), some interesting facts are presented. The editor gives a symposium on the subject of capital-punishment. It is the substance of correspondence, he says, received from approximately one hundred penitentiary wardens, superintendents, and practical penologists. Those who advocate the death penalty fear the disastrous results of its abolition. Secretary Thompson, of the Connecticut Prison Association, though much shocked by the taking of life in prisons under legal sentences, said: "It is a grave question whether our civilization has progressed to the point where we can give up the restraining influence of the severe penalty."

In this connection it might be asked what the progress of civilization has to do with the infliction of the death penalty, so long as the progress of civilization has not prevented the birth of murderers. It is not a question as to how much progress society as a whole has made, as a question of how little progress the murderers have made toward becoming fit for human association. All these discussions as to the progress of civilization are absolutely irrelevant, having no more to do with penology than with arithmetic or painting in water colors. The pure and simple question is this, Why should society, seeking to pro-

tect itself, preserve the lives of the anti-social, the morally hopeless, the economically disastrous?

It is significant that there is much dissatisfaction with the life imprisonment law in Wisconsin. There has been much discontent ever since the abolition of the death penalty. F. G. Swoboda reports for the symposium that life prisoners are eligible to parole in sixteen years and three months. When strong influences are brought to bear, many are pardoned within a few years after being convicted.

In Minnesota there is unrest over the law, mild and poorly enforced, against murder. The county attorneys of the State, at their last annual meeting (probably 1912), passed resolutions asking the Legislature to restore capital-punishment for murder in the first degree.

From a source other than The Review's symposium the author of this book learns that an eminent Episcopal rector recently reported that the life imprisonment law of Minnesota was generally regarded as a farce and that life imprisonment is never such in fact. It has little deterrent influence in cases of cold-blooded criminals.

GOVERNORS FOR CAPITAL-PUNISHMENT.

The following governors express themselves as heartily in favor of capital-punishment, especially in grave cases, or when the jury has recommended such punishment: Mann, of Virginia; Hadley, of Missouri; Gilchrist, of Florida; Carey, of Wyoming; Hay, of Washington; Osborn, of Michigan. Governor Burke, of North Dakota, reports that "he does not feel that we have arrived at that stage of civilization where we can do away with it altogether."

Like Secretary Thompson, quoted above, this Governor seems to have missed the point that where "we have arrived" has nothing to do with the graver question that concerns the point to which the murderer has arrived.

A number of those reporting felt that life imprisonment would be preferable if it were life imprisonment, in fact, beyond hope of escape or pardon. The editor says that "the IF bulked large in all these answers." In other words, the ifs, buts, and other qualifications negated the suppositions.

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The Superintendent of the Territorial Indian School at Benson, Arizona, fears that "some soft governor, under life imprisonment, would grant pardons and the criminals would kill others." This is a sane fear, borne out in some of the foregoing statements, as in human experience the world over.

Superintendent F. H. Briggs, of the State Industrial School at Industry, New York, said: "No matter how atrocious the crime, some influence is always found to secure a remittance of the sentence of imprisonment within a few years."

This view was emphasized and heartily indorsed by the Superintendent of the Hopeville, Georgia, Industrial Farm, and by Judge Garver, of Topeka, Kansas, where there is no death penalty. The Judge said: "Unfortunately we see too many instances where executives have been influenced to turn felons loose again upon society, thus giving hope and encouragement to every one of that class to risk his chances with the law, rather than abstain from crime."

A number of those making reports felt that some criminals "are so totally depraved in nature that death is advisable." Several contended that incarceration has no terrors for the brutal criminal and that lynchings would increase under life imprisonment. This view was emphasized by Warden M. L. Brown, of the West Virginia penitentiary.

Warden Sale, of North Carolina's penitentiary, strongly urged capital-punishment for extreme cases. He said that long experience confirmed the belief in the efficacy of the gallows. He added: "The murderous, dangerous criminal becomes sullen and morose, and refuses to obey rules. Upon him punishment has to be inflicted to secure from him obedience to rules. He grows worse and becomes desperate and will take any chances to escape, even if secretly or openly to slay his keeper; for he knows there is no greater punishment than life imprisonment, and will not hesitate to commit any crime to obtain liberty or revenge. The lives of keepers and fellow-convicts would be endangered if criminals of this type were to realize that a life imprisonment, with hope of pardon or escape, is the limit. A hopeless murderer should be hanged. Officers

and inmates of penitentiaries, as well as society, should be protected from the violent and vicious destroyers of human life."

SOME SHALLOW ARGUMENTS.

The principal arguments against the gallows were that it does not deter, because so seldom used—which is like the tooth-ache medicine that did not cure because it was not tried. In other words, this is not an argument at all. Such persons should study the effect of the gallows where used, say, in England.

Several advocated sterilization of criminals. Miss Kate Barnard, the charities commissioner of Oklahoma, expressed this view. She would then send them to an industrial colony for life, with no chance of pardon or escape. A new human nature will be required before her conditions can be complied with.

Mrs. E. C. Shippen, of the Virginia Manual Training School, was firmly in favor of capital-punishment.

Warden Scott, of the New Hampshire State Prison, believes in capital-punishment in cases of premeditation only. Some of the Southern penologists would limit the death penalty to cases of rape. Warden Henry Wolfer, of Minnesota, would limit the death penalty to cases where an officer of a penitentiary or other prison is killed by a convict. The man who butchers his father and mother, slays his wife and children, under this policy, would become a favorite as against the convict who might slay a brutal keeper of his cage.

Superintendent P. J. McDonnell, of the Elmira Reformatory, advocated life imprisonment with no chance of pardon, and he would put the life prisoner at work in a solitary cell, with exercise in solitude, and no chance ever to see a visitor. In other words, slow death rather than swift—insanity, the dwarfing of the mental faculties, and the cultivation of self-regarding desires, as explained by Herbert Spencer, until the man in the cage should become a wild beast.

Warden Osborne, of New Jersey, favored this view, but opposed capital-punishment as a violation of the mandates of God.

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A LAND OF MURDERERS.

With more than seven thousand murders each year in the United States—more than seventy-seven to each million of the population—it is surprising that only about one murderer in each hundred is convicted. Of those convicted only a fraction are ever put to death, many serve comparatively short terms, and many more are either paroled or pardoned.

In Germany the convictions for murder are ninety-five per cent, while in England the certainty of the rope for premeditated murder has reduced that crime to a greater extent than in any country on the globe. That the punishment for fiendish crimes is swift and drastic in the United Kingdom may be shown in almost every case that comes to trial either in England proper or in her colonies beyond the seas—and the punishment is capital. An American, Crippen, slays his wife and disappears. Within a few weeks he is caught, tried and hanged. Similar crimes in the United States are punished, if at all, at the end of long, tedious, and technical trials. The loopholes through which hair-splitting lawyers may lead their clients to freedom are innumerable. The extent to which veniremen are examined before accepted as jurors, the badgering of witnesses, and the shadows of legal objections that are permitted to stand in the path of the Godness of Justice are simply appalling.

In spite of modern theories that would make escape from murder even easier than it is in the United States today, the ancient law of sacrifice stands as the only safe and sure bulwark of our liberties, the only guarantee of the safety of human life.

Nothing seems more just than that every man's hand should be lifted against the calculating murderer, the secret poisoner, the deliberate and watchful paid assassin. Yet it is now quite the fashion to apologize for him, to preach of the sacredness of life in general, to coddle and seek to reform the man who ruthlessly commits the most revolting of crimes. Why?

SOME APPALLING CRIMES.

Appalling murders have become so frequent by reason

of the non-enforcement of drastic punishment that the most calculating and inexcusable of criminals figure their chances of conviction at about one in a hundred, with the hope of pardon if convicted. Diabolism runs rampant to such an extent that we expect to read of from two to half a dozen revolting crimes every time we pick up a daily newspaper. Observe these cases, picked at random in the summer of 1913, in California:

A Los Angeles husband, weary of the faithful wife who was bravely struggling to support and educate her daughters, coaxed her to some foothills adjacent to that City, and shot her to death in order that he might be free to marry another woman. His victim had been warned of the murderer's intentions and had notified one of her daughters not to let the father escape, in the event that anything should befall her.

An Oakland man deliberately beat his wife to death, having frequently threatened to do so. He bought a club for the purpose and provided his shoes with extra heavy soles in order that his kicks might be more deadly.

A fiend ravished, robbed and murdered a girl in Death Valley. In spite of the tears and prayers of many women who desired his life spared, this wretch was hanged.

Organized movements of men and women, really believing that they are benefactors of society, are busy throughout the United States in an effort to preserve the lives of men of the character described in these few paragraphs. Meantime the laws are becoming softer, juries are losing their courage, and convictions followed by anything like adequate punishment are becoming unusual.

With this terrible condition confronting us, why should we refuse to profit by the example of England and the object-lesson of her comparative freedom from the more shocking forms of human slaughter? Over there, the rope and conviction are inseparable. The time is ripe for a thorough examination of the entire question of murder and its punishment.

In the *Annals of the American Academy*, May, 1907, J. E. Cutter takes the position that the abolition of capital-punishment would increase lynchings in the United States. There are already more lynchings than legal executions,